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OCTOBER TERM, 1996

VILLAGE OF WESTHAVEN, JAMES P. O'BRIEN, LORIN SCHAB, JAMES GRAVES, JAMES SURDYK, WILLIAM RULIEN, VILLAGE OF ORLAND PARK, ORLAND SCHOOL DISTRICT NO. 135, ORLAND FIRE PROTECTION DISTRICT, JOHN ARENZ, PATRICK BURKE, ERIC CONORS, JOAN FIRSK, BARRY JONES, CHARLES KIDD, DANIEL MAJEWSKI, ROD OHLROGGE, MERRILL SINGLETERRY, CHARLES THOMPSON and GREGORY WACHOWIAK,

Petitioners,

v.

J. FRED CREEK,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under the holding of *First National Bank of Boston v. Belotti* and the *Noerr-Pennington* doctrine, are municipal corporations, their officers and other bodies "politic and corporate" that petition state and federal authorities regarding matters of public concern, entitled to First Amendment immunity from suit?

2. Is a local fire protection district that has been granted immunity for its petitioning activity pursuant to the *Noerr-Pennington* doctrine, entitled to immunity for a pendent state law claim alleging tortious interference with prospective business advantage where that claim is based on the same privileged petitioning activity?

3. Does a school district waive its right to assert First Amendment defenses to a federal civil rights and state tort action by contractually agreeing not to oppose the construction of a subsidized housing development?

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Petitioners, Village of Westhaven, James P. O'Brien, Lorin Schab, James Graves, James Surdyk, William Rulien, John Arenz, Patrick Burke, Eric Conors, Joan Firsk, Barry Jones, Charles Kidd, Daniel Majewski, Rod Ohlrogge, Merrill Singleterry, Charles Thompson, Gregory Wachowiak (collectively "Westhaven defendants"), Village of Orland Park ("Orland Park"), Orland School District No. 135 ("School District") and Orland Fire Protection District ("Fire District"), respectfully petition this Court for a writ of certiorari to the United

States Court of Appeals for the Seventh Circuit. Petitioners seek reversal of the Seventh Circuit's decision reversing the order of the United States District Court for the Northern District of Illinois, Eastern Division, granting summary judgment to petitioners.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, reversing the grant of summary judgment to petitioners, is set forth in the Appendix, *infra*, at App. 1-13 and reported as *Creek v. Village of Westhaven, et al.*, 80 F.3d 186 (7th Cir. 1996). That court's order denying petitioners' Petition for Rehearing is set forth in the Appendix, *infra*, at App. 14.

The district court's order of January 13, 1987, denying the Westhaven defendants' motion for judgment on the pleadings based on the *Noerr-Pennington* doctrine is set forth in the Appendix, *infra*, at App. 15-30.

The district court's order of April 10, 1992, granting summary judgment to the Fire District as to J. Fred Creek's ("Creek's") federal claims only and denying summary judgment to Orland Park and the School District on *Noerr-Pennington* grounds is set forth in the Appendix, *infra*, at App. 31-56. The district court's order of July 30, 1993 reaffirming this order is set forth in the Appendix, *infra*, at App. 57-73.

The district court's order of December 21, 1994, barring certain claims on *res judicata* grounds is set forth in the Appendix, *infra*, at App. 74-97. The district court's January 24, 1995, order granting summary judgment to petitioners on the remainder of Creek's claims is set forth in the Appendix, *infra*, at App. 98-124.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit reversed the district court's grant of summary judgment to petitioners on March 19, 1996. That court denied petitioners' Petition for Rehearing on April 26, 1996.

Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST., Amend 1

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

In November, 1982, Creek, a real estate developer, filed this civil rights action against petitioners and other defendants who have since been dismissed. The petitioners are the Village of Westhaven, a municipality, its mayor and some of its trustees, the Village of Orland Park, a municipality, Orland School District No. 135, a body "politic and corporate" and Orland Fire Protection District a body "corporate."

In Counts I and II, Creek alleged that the Westhaven defendants violated his civil rights by refusing to approve the plans for a certain real estate development and by opposing the governmental financing and construction of Section 8 housing in the Village of Westhaven.[1] In Count III, he claimed that all of the petitioners conspired to violate his civil rights by refusing to approve the plans and by opposing the federal financing of the development.[2] In Count IV, he alleged that the individual Westhaven trustees violated his civil rights by neglecting and refusing to prevent the conspiracy.[3] In Count V, he charged all petitioners with the state law tort of intentional interference with prospective economic advantage.

According to Creek, the centerpiece of the alleged conspiracy was a concerted letter-writing campaign directed to various state and federal officials, detailing petitioners' objections to the proposed federal financing. Creek further alleged that the Westhaven Homeowners Association and its attorney (former defendants) furthered the conspiracy by filing a lawsuit against the United Sates Department of Housing and Urban Development in the federal district court to invalidate HUD's approval of rent supports for the development.

In 1985, the Westhaven defendants moved for judgment on the pleadings, arguing, *inter alia*, that their con-

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[1] Specifically, Creek alleged that Westhaven's course of conduct deprived him of equal protection of the laws as guaranteed by 42 U.S.C. § 1981, 1982, 1983 and 3601 *et seq.* and the Fifth, Thirteenth and Fourteenth Amendments to the United States Constitution.

[2] This claim was premised on to 42 U.S.C. § 1985(3).

[3] This claim was premised on 42 U.S.C. § 1986.

duct was protected under the "*Noerr-Pennington* doctrine." That doctrine was enunciated in *Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) and applied to civil rights cases in *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329 (7th Cir.), *cert. denied*, 434 U.S. 975 (1977).

In 1987, the district court denied this motion, in part finding that the Village of Westhaven was not entitled to First Amendment protection.

In 1991, Orland Park and the Fire District sought summary judgment based on the *Noerr-Pennington* doctrine. The district court reasoned that at the time of the alleged petitioning activity the Fire District was "merely under private contract with Westhaven to provide fire protection and ambulance service to the Village" and thus, it was "independent enough to be considered more like a private corporation than a state entity." Accordingly, the district court granted summary judgment to the Fire District on the civil rights claims, holding that its limited participation in the letter-writing campaign was constitutionally protected activity. However, the district court refused to dismiss Count V, sounding in tortious interference with prospective business advantage.[4]

As to Orland Park, the district court maintained that it, like Westhaven, was not entitled to First Amendment protection. Based on a perceived lack of evidence, the district court did not rule on the School District's right to First Amendment protection at that time. Thereafter,

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[4] The court reaffirmed this ruling on July 30, 1993, upon Creek's motion for reconsideration.

upon the School District's motion for summary judgment, the district court held that the School District was entitled to First Amendment protection but that issues of fact existed as to whether the School District had waived that protection.

Discovery proceeded. On December 21, 1993, on the eve of trial, the district court barred certain remaining claims and then, based on "apparent inconsistencies in [Creek's] theory of the case," invited petitioners to file renewed motions for summary judgment on *res judicata* grounds.[5]

On January 24, 1995, the district court granted summary judgment to petitioners on all the remaining claims based on the doctrine of *res judicata*. Creek appealed.

On appeal, petitioners maintained that the court's *res judicata* ruling was correct, and that in any case their conduct was protected under the *Noerr-Pennington* doctrine. The Fire District, which had previously obtained summary judgment on the civil rights claims, also argued that it was properly dismissed from the action be-

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[5] *Res judicata* issues emerged because Creek had previously sued the Village of Westhaven in state court, seeking mandamus, injunctive relief and money damages on account of Westhaven's withholding of the required building permit. The state court issued an injunction on April 14, 1980, directing Westhaven to issue the permit. Thereafter, the Westhaven Homeowners Association filed its suit against HUD. Creek returned to state court to seek enforcement of the injunction and on August 28, 1980, the state court entered an agreed order directing Westhaven to issue the permit and directing the Homeowners' Association to drop its federal suit. On July 1, 1980, in the midst of this litigation, Creek transferred his individual interest in the project to Pheasant Ridge Venture, a limited partnership.

cause the pending state law tort claim was barred by *Havoco of America, Ltd. v. Hollobow*, 702 F.2d 643, 649 (7th Cir. 1983).

The Seventh Circuit reversed the district court's ruling that Creek's claims were barred on *res judicata* grounds, but it cut off Creek's damages as of July 1, 1980, the date Creek transferred his entire interest in the project to the Pheasant Ridge Venture partnership. Based on this holding, the Seventh Circuit also stated that it "need not decide whether the lobbying, the 'letter-writing campaign' [which began after July 1, 1980] was privileged." App. at 9, 80 F.3d at 192. Thus, according to the Seventh Circuit, the petitioners could only be deemed liable as co-conspirators for the act of the Homeowners Association, in filing its federal court lawsuit. As to petitioners' argument that they were entitled to *Noerr-Pennington* protection, the court stated that the question of whether municipal corporations have First Amendment rights is "an open one" in the circuit, but that "[e]ven if municipalities do have First Amendment rights, . . . we do not think they have the right to foment, whether through speech or otherwise, governmental discrimination on the grounds of race." App. at 11, 80 F.3d at 193.

On April 25, 1996, the Seventh Circuit denied petitioners' petitions for rehearing. This Petition for Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT CERTIORARI TO CONFIRM THAT THE FIRST AMENDMENT PROTECTS MUNICIPAL CORPORATIONS, THEIR OFFICERS AND BODIES "POLITIC AND CORPORATE" WHEN THEY PETITION STATE AND FEDERAL AUTHORITIES REGARDING MATTERS OF PUBLIC CONCERN.

Introduction

Petitioners unquestionably engaged in petitioning activity when their representatives sent letters to state and federal governmental agencies and elected officials stating their reasons for opposing Creek's housing development. The letters reflected the opinions and views of the authors and their constituents. This is exactly the type of dissemination of information and ideas and exactly the type of public access to discussion and debate that is integral to the political process in a democracy. When local governments or bodies "politic and corporate" petition state and federal officials regarding matters of local public concern, they should be afforded protection under the First Amendment.

This position is steeped in constitutional precedent. In *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), where the plaintiffs alleged that the defendants had conducted a publicity campaign with the intent of fostering legislative action destructive of plaintiffs' businesses, this Court held:

> We think it . . . clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly.

365 U.S. at 136.

This Court further developed the holding of *Noerr* in *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965), where the plaintiffs alleged an anti-competitive conspiracy between a union and coal companies, which included successful attempts to influence the Secretary of Labor to establish a minimum wage. This Court expansively held: "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent of purpose." 381 U.S. at 670.

The *Noerr-Pennington* doctrine has been applied equally, by state and federal courts, in cases alleging civil rights violations. *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329 (7th Cir.), *cert. denied*, 434 U.S. 975 (1977); *Havoco of America, Ltd. v. Hollobow*, 702 F.2d 643 (7th Cir. 1983); *Computer Assocs. Int'l, Inc. v. American Fundware, Inc.*, 831 F. Supp. 1516, 1522 (D. Colo. 1993) (citing *Azzar v. Primebank, FSB*, 499 N.W.2d 793 (Mich. Ct. App.), *app. denied*, 505 N.W.2d 581 (Mich. 1993), and *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993)).

While this Court has never addressed whether local governments or bodies "politic and corporate" are entitled to First Amendment protection under *Noerr-Pennington*,[6] it has held, in *First National Bank of Boston v. Belotti*, 435 U.S. 765 (1978), that private corporations enjoy First Amendment rights because the First Amendment protects speech, regardless of who the speaker is. As dis-

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[6] This Court left open the similar question of whether municipal corporations enjoy First Amendment rights to hear the views of their citizens and employees, in *City of Madison Joint Sch. Dist. No. 8 v. Wisconsin Empl. Relations Comm'n*, 429 U.S. 167, 175 n.7 (1976).

cussed below, the instant case warrants a natural extension of *First National Bank of Boston* and the *Noerr-Pennington* doctrine to local governments, their officials and bodies "politic and corporate." Given the need to protect their own interests and the interests of their constituents, the right to petition is no less important for a local governmental entity than for a private entity. Local governmental entities are essential to our governmental structure and must be free to petition state and federal authorities without fear of retribution.

A. This Court Should Grant Certiorari To Assert That The First Amendment, Which Protects Speech, Not The Speaker, Protects Municipal Corporations, Their Officers And Bodies "Politic and Corporate."

In *First National Bank of Boston, supra,* this Court drew from long-standing precedent when it expounded on the parameters of the First Amendment's protection:

> The speech proposed by appellants is at the heart of the First Amendment's protection.
>
> > 'The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.' *Thornhill v. Alabama*, 310 U.S. 88, 101-102, 60 S.Ct. 736, 744, 84 L.Ed. 1093 (1940)
>
> . . .

> As the Court said in *Mills v. Alabama*, 384 U.S. 214, 218, 86 S.Ct. 1434, 1437, 16 L.Ed. 484 (1966), 'there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.' If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy [footnote omitted], and this is no less true because the speech comes from a corporation rather than an individual [footnote omitted]. The inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of its source, whether corporation, association, union, or individual.

435 U.S. at 776-777.

Further, in holding that the corporate identity of the speaker did not deprive the speech of First Amendment protection, this Court stated:

> We thus find no support in the First or Fourteenth Amendment or in the decisions of this Court, for the proposition that speech that would otherwise be within the protection of the First Amendment loses that protection simply because its source is a corporation that cannot prove, to the satisfaction of the court a material effect on its business or property. . . . In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which people may speak, and the people who may address a public issue.

435 U.S. at 784.

In other words, it is the law of the land that if the speech is protected under the First Amendment, the First Amendment protects the speaker. The law also applies to the right to petition, which has been deemed

as among the most precious of the liberties safeguarded by the Bill of Rights; it is fundamental to the very idea of a republican form of government. *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329 (7th Cir.), *cert. denied*, 434 U.S. 975 (1977). As this Court stated in *United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967):

> [T]he rights to assemble peaceably and petition for redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights. These rights, moreover, are intimately connected, both in origin and in purpose, with the other First Amendment rights of free speech and free press. "All these, though not identical, are inseparable." *Thomas v. Collins*, 323 U.S. 516, 530 (1945). See *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937).

Plainly, writing letters to governmental agencies and elected public officials, and filing lawsuits against governmental entities, are protected petitioning activities under the First Amendment if conducted by private individuals or corporations.[7] Under this Court's analysis in *First National Bank of Boston*, there is no principled difference between the protections afforded to public and private speakers under the First Amendment and those which should be afforded to municipal corporations, their officers and other bodies "politic and corporate." Therefore, this Court should grant certiorari to confirm that petitioning activity by such entities and their officers to

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[7] Indeed, the only pre-July 1, 1980 conduct by any non-Westhaven defendant, the Homeowners lawsuit against HUD, was, as the Seventh Circuit correctly recognized, also a "form of petition for redress of grievances or as an exercise of freedom of speech." App. at 9, 80 F.3d at 192.

state and federal entities regarding matters of public concern is similarly protected under the First Amendment.[8]

The analysis of several courts that have considered this issue, and applied *First National Bank of Boston* and the *Noerr-Pennington* doctrine to protect local governmental petitioning activities, is instructive. *County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1387 (E.D.N.Y. 1989), *aff'd on other grounds*, 907 F.2d 1295 (2d Cir. 1990); *Fischer Sand & Aggregate Co. v. City of Lakeville*, 874 F. Supp. 957 (D. Minn. 1994).

In *County of Suffolk*, Long Island Lighting Company raised an equitable defense to Suffolk County's RICO suit. In dismissing the equitable defense, the court held that Suffolk County had a constitutional right under the First Amendment to speak and act in opposition to Long Island Lighting Company's request to the New York Public Service Commission for higher electric rates in order to build a nuclear power facility. 710 F. Supp at 1390. In so holding, the court stated:

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[8] The motivation behind the communications should not have any bearing on whether they are protected and the Seventh Circuit's *dicta*, that communications could not be protected if they fomented "governmental discrimination on grounds of race" (App. at 11), misses the mark as applied to this case. Of course, a content-based limitation is not completely without precedent or justification in First Amendment jurisprudence. *See, e.g., Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 Northwestern U.L.Rev. 343, n.2 (1991). But, in this case, there is no question that all of the speech at issue was racially neutral. Thus, the Seventh Circuit was improperly evaluating petitioners' alleged motive for opposing Creek's proposed housing development, and not the speech itself.

> A municipal corporation, like any corporation, is protected under the First Amendment in the same manner as an individual. See *First National Bank of Boston v. Belotti*, 435 U.S. 765, 776-84, 98 S. Ct. 1407, 1415-20, 55 L.Ed. 2d 707 (1978). The right to petition administrative agencies is a basic First Amendment right. (Citations omitted.)

Id.

The *County of Suffolk* court further held that the county's activities before the United States Nuclear Regulatory Commission were privileged against claims that it improperly delayed the licensing proceedings. *Id.* The court specifically held that the *Noerr-Pennington* doctrine protected the county's right to oppose its adversaries before administrative agencies and that no damages could be recovered arising from the county's exercise of its constitutional right to oppose the nuclear power plant. *Id.*

In *Fischer Sand & Aggregate Co. v. City of Lakeville*, 874 F. Supp. 957 (D. Minn. 1994), a developer sought a new zoning designation for property and variances from several agencies in order to open a gravel mine. Officials from the adjacent city actively opposed the gravel mine in rezoning and permit proceedings before municipal, state and local agencies. The developer filed suit against the municipality and municipal officials claiming interference with contractual relations and prospective economic advantage and denial of due process and equal protection. The court held that the First Amendment and the *Noerr-Pennington* doctrine applied to municipalities. 874 F. Supp. at 959-61. In so holding, the district court stated:

> The fact that Defendants are government officials and acted in their official capacity does not deprive them of the protection of the *Noerr-Pennington* doctrine. In fact, it is more likely that such government defendants act with the intent of advancing the public interest in exercising their First Amendment rights than private petitioners; this buttresses the justification for clothing the Defendants with immunity from suits arising from their petitioning activities. See *Allied Tube & Conduit Corp. v. Indian Head*, 486 U.S. 492, 501, 108 S.Ct. 1931, 1937, 100 L.Ed.2d 497 (1988). *In any event the Court finds no reason that public officials and municipalities should receive any less protection under Noerr-Pennington than private petitioners and thus concludes that all Defendants, including the City of Lakeville, fall within the scope of the Noerr-Pennington doctrine.* See *Id; County of Suffolk v. Long Island Lighting Company*, 710 F. Supp. 1387, 1390 (E.D.N.Y. 1989) and cases cited therein, *aff'd*, 907 F.2d 1295 (2nd Cir. 1990).

Id. at 959 (emphasis added).[9]

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[9] Further still, although not directly addressing the issue, the Illinois Appellate Court's decision in *Village of Lake Barrington v. Hogan*, 272 Ill.App.3d 225, 649 N.E.2d 1366 (1995), provides additional authority for the proposition that the *Noerr-Pennington* doctrine applies to the petitioners in this case. In *Hogan*, a village brought suit against private individuals for alleged interference with a special service area. The defendants counterclaimed against the village for alleged violation of 42 U.S.C. § 1983. The Appellate Court held that local governmental bodies are immunized from suit under the *Noerr-Pennington* doctrine, but nevertheless allowed the suit to stand under the sham exception. Implicit in the *Hogan* decision is the proposition that the *Noerr-Pennington* doctrine applies to municipalities and other local public bodies.

First Amendment protection has also been held to apply to a body "corporate and politic" under a similar analysis. *Monarch Entertainment Bureau v. New Jersey Hwy. Author.*, 715 F. Supp. 1290 (D.N.J.), *aff'd*, 893 F.2d 1331 (3d Cir. 1989). In that case, an entertainment promoter brought an antitrust suit against the New Jersey Highway Authority alleging that it managed its concert facility in an anti-competitive manner. The court found the *Noerr-Pennington* doctrine to be applicable and dismissed the complaint for failure to state a cause of action. It reasoned as follows:

> Ultimately, however, *Noerr*'s first policy consideration, the government's need for access to information, remains relevant to quasi-governmental agencies. In the complex fabric of governance, there are a multiplicity of levels, agencies, departments and authorities, each with its own mandate and constituency. One office needs to hear what another has to say; one level of government must be free to obtain information from, as well as to persuade another. To mute the voices of state agencies through the threat of antitrust suits whenever the agency's counsel action that could have anticompetitive effects would impede the flow of significant information and interfere with an agency's legitimate efforts to advance its mission [footnote omitted].

715 F. Supp. at 1303.

The *Monarch* court's analysis of this case applies with full force here. The petitioners "must be free to obtain information from, as well as to persuade another." *Monarch, supra,* at 1303. To mute their voices through the threat of litigation "would impede the flow of significant information and interfere with an agency's legitimate efforts to advance its mission." *Id.* The subject petition

gives the Court a significant opportunity to define the scope of First Amendment protection afforded to municipalities and other local public bodies.[10]

B. This Court Should Grant Certiorari To Resolve The Conflict That Exists Between The Sixth And Seventh Circuits As To The Co-Conspirator Rule.

Despite the fact that the Seventh Circuit twice stated that it did not need to reach the First Amendment issues raised, that court stated that the petitioners could be held liable as co-conspirators for the filing of the Homeowners lawsuit. App. at 9, 80 F.3d at 192. This statement squarely raises the First Amendment issue. If the letters do constitute petitioning protected by the First Amendment, as petitioners contend, then a finding that the petitioners joined a civil conspiracy based on that evidence would mean that legal liability could be predicated solely on activity protected by the First Amendment. There is no indication in the case law that the co-conspirator rule was meant to create liability for conduct that would otherwise be privileged.

Further, the Seventh Circuit's broad application of the co-conspirator rule to this case stands in marked contrast to the Sixth Circuit's approach to the issue, and thus creates a conflict among the circuit courts of appeal. In *United States v. Peraino*, 645 F.2d 548 (6th Cir. 1981),

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[10] To the extent that, as suggested by some lower courts, including the district court in this case, there are differences between the First Amendment protections afforded municipalities as compared to other local bodies like school or fire protection districts, this case provides the ideal vehicle for clarifying those distinctions.

the court reversed a conviction of a defendant, who had been convicted of criminally conspiring to distribute obscene materials. The defendant had agreed to join the venture *after* the distribution charged in the indictment occurred, and did not engage in any acts within the federal district at issue. The Sixth Circuit reasoned that it was highly possible that the speech at issue might have been protected by the First Amendment in the district where the defendant distributed it. The issue presented, therefore, was precisely the same as the one presented here: whether the co-conspirator liability rule could trump the First Amendment protection of the substantive conduct. Unlike the Seventh Circuit, the Sixth Circuit held that "[t]he general rule that one who joins a conspiracy at any time before it ends may be held responsible for acts and agreements which took place before he joined . . . *does not control when First Amendment rights are at stake*." *Id.* at 551 (emphasis added and citation omitted). This Court should grant certiorari to resolve the conflict between the two circuit courts of appeal.

II.

THIS COURT SHOULD GRANT CERTIORARI TO PROVIDE DEFINITIVE GUIDANCE ON WHETHER THE IMMUNITY PROVIDED FOR THE FIRST AMENDMENT RIGHT TO PETITION ALSO APPLIES TO A PENDENT STATE COMMON LAW TORT CLAIM.

While the district court recognized that the Fire District was entitled to *Noerr-Pennington* protection as to the federal civil rights claims, it refused to grant summary judgment on the pendent state law tort claim as well. Other federal courts, including the Seventh Circuit,

have recognized the principle that *Noerr-Pennington* protection applies equally to state law tort claims (*e.g., Havoco of America, Ltd. v. Hollobow*, 702 F.2d 643 (7th Cir. 1983); *Video International Production Inc. v. Warner-Amex Cable Communications, Inc.*, 858 F.2d 1075, 1084 (5th Cir. 1988); *Sierra Club v. Butz*, 349 F. Supp. 934 (N.D. Cal. 1972)), but the Seventh Circuit inexplicably refused to address this issue on appeal.

This Court should grant certiorari to definitively state that the immunity provided for the First Amendment right to petition applies also to a pendent state law tort claim.

III.

THIS COURT SHOULD GRANT CERTIORARI TO DECLARE THAT PARTIES CANNOT WAIVE THEIR RIGHT TO PETITION UNDER THE FIRST AMENDMENT AS DEFENSES TO CIVIL RIGHTS AND TORT CLAIMS WHEN THEY CONTRACTUALLY AGREE NOT TO OPPOSE THE CONSTRUCTION OF A HOUSING DEVELOPMENT.

The district court found that while the School District, like the Fire District, did indeed have petitioning rights under the First Amendment in 1980, when it participated in the letter-writing campaign to oppose the development, it could not grant summary judgment in favor of the School District on that issue because of a possible waiver of those rights by the School District in 1975. The Seventh Circuit never reached the waiver issue because of its erroneous analysis of First Amendment and co-conspirator law. The lower court ruling, however, is a dangerous extension of waiver law in the area of fundamental constitutional rights and should be corrected by this Court.

According to a 1975 contract between the School District and Terracom (Creek's predecessor in interest), Terracom agreed to pay the School District $44.57 per dwelling unit to off-set the increased educational costs of the potential new public school students from the proposed development. In return, the School District promised not to oppose the development. The district court concluded that there was a factual dispute over whether the contractual agreement not to oppose the development constituted a waiver of First Amendment defenses to the civil rights and tort actions. This ruling conflicts with all precedent. As a matter of law, the 1975 agreement between Terracom and the School District cannot constitute a waiver, in 1980, of the School District's First Amendment rights for purposes of Creek's personal civil rights and tort claim.

It is settled law that although the waiver of a constitutional right is certainly possible, it must "ordinarily be an intentional relinquishment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). A court presented with such a constitutional waiver claim must " 'indulge in every reasonable presumption against waiver' of fundamental constitutional rights. . . ." *Id.* (quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937)). First Amendment free speech rights, moreover, are clearly included in this body of fundamental rights which are difficult to waive. Indeed, the constitutional protection which Creek contends that the School District has waived—the First Amendment right to petition the government—"safeguards a freedom which is the 'matrix, the indispensable condition, of nearly every other freedom.' " *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145

(1967) (quoting *Palko v. Connecticut*, 302 U.S. 319, 327 (1937)).

There is no justification for assuming that by contracting with Terracom in 1975 not to oppose the development in return for an impact fee, the School District intended to subsequently waive its First Amendment rights and subject itself to the increased exposure and risk arising from civil rights cases. On the contrary, the most that can be assumed is that when the School District entered into the agreement in 1975, it was opening itself up to a breach of contract action if it opposed any portion of the development sometime in the future.

In any case, where courts find that a party has waived a constitutional right, the waiver has been made in the precise context of the ultimate issue in the litigation. *See e.g., Curtis Publishing Co. supra*, 388 U.S. at 144-45 (it is possible to waive a First Amendment defense to a tort claim if the First Amendment was not raised at trial on that tort claim); *Erie Telecommunications, Inc. v. City of Erie*, 853 F.2d 1084, 1094-1100 (3d Cir. 1988) (a cable television company *contractually* waived a First Amendment defense to a *contract action* where it had previously signed a release stating it would not challenge the validity of the agreement).

Application of this rule to this case, however, compels the conclusion that the School District did not waive its First Amendment rights. Creek's claims are not to enforce the 1975 contract; the breach of contract action was settled years ago with the partnership that held the contractual rights at the time the School District wrote the letters opposing the development in 1980. Creek, rather, is seeking to use a general contractual promise not to op-

pose the development to bar a valid First Amendment defense to civil rights and tort claims occurring years later. There is no support for such a broad use of waiver in the law and Creek's argument should be flatly rejected.[11]

CONCLUSION

Wherefore, for the foregoing reasons, petitioners, Village of Westhaven, James P. O'Brien, Lorin Schab, James Graves, James Surdyk, William Rulien, John Arenz, Patrick Burke, Eric Conors, Joan Firsk, Barry Jones, Charles Kidd, Daniel Majewski, Rod Ohlrogge, Merrill Singleterry, Charles Thompson, Gregory Wachowiak, Village of Orland Park, Orland School District No. 135 and Orland Fire Protection District respectfully pray that their Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh

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[11] Further, even the claim that the School District contractually waived First Amendment rights vis-à-vis the *contract* fails as a matter of law. The contract has no explicit waiver clause and never even mentions the Constitution or the First Amendment. Although implicit waiver is possible in certain situations, it could not be present here, where the School District could not possibly have known, in 1975, that it had any First Amendment rights to waive. As the Seventh Circuit recognized, the issue of whether municipal bodies have First Amendment rights is of recent vintage. The right simply could not have been knowingly waived by a school district in 1975. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (finding no waiver of First Amendment defense at trial where status of the law had not yet been clarified by this Court at time of trial).

Circuit be granted and the Seventh Circuit be directed to reinstate the summary judgment order in favor of the petitioners.

Respectfully submitted,

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APPENDIX

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 95-1465

J. FRED CREEK,

Plaintiff-Appellant,

v.

VILLAGE OF WESTHAVEN, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 83 C 1851—**Ann Claire Williams**, *Judge.*

ARGUED NOVEMBER 7, 1995—DECIDED MARCH 19, 1996

Before POSNER, *Chief Judge*, COFFEY, *Circuit Judge*, and SKINNER, *District Judge.**

POSNER, *Chief Judge.* The plaintiff in this unfortunately protracted, thirteen-year-old civil rights suit appeals from the dismissal of the suit on summary judgment. The parties have showered us with 198 pages of briefs, but the essential facts, duly simplified, and the legal issues, can be stated briefly. Creek, the plaintiff, is a real estate developer who wanted to build a 216-unit apartment com-

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* Hon. Walter Jay Skinner of the District of Massachusetts, sitting by designation.

plex in the Village of Westhaven, Illinois. Westhaven, now known as "Orland Hills," is an all-white suburb of Chicago. Creek needed a permit from the Village in order to proceed. All was going swimmingly—the Village was eager for the development—until January 9, 1979, when the Village learned that Creek was asking the U.S. Department of Housing and Urban Development for federal rent support for 40 percent of the units. Creek contends—we must assume for purposes of this appeal correctly—that the Village, knowing that rent support would make the development attractive to black people and wishing to keep Westhaven white, determined to prevent Creek from going forward with the development. So it denied him the permit on pretextual grounds.

Creek sued in Illinois state court on August 29, 1979, for an injunction against the Village's withholding the permit. The court issued the injunction on April 14, 1980. This was a final judgment, terminating Creek's suit. The Village neither complied with the judgment nor appealed it. A month later the Westhaven Homeowners Association, acting in cahoots with the Village to block Creek's development, sued HUD in federal district court to invalidate HUD's approval of rent support for Creek's development. Creek returned to state court to seek enforcement of the injunction against the Village. On August 28, 1980, the court entered a consent order directing the Village to issue the permit and requiring the Homeowners Association, although it was not a party to the state court suit, to drop the federal suit. Which it did. But the Village defied the consent order by not issuing the permit. Shortly afterward, the defendants, who include not only the Village but also other municipal corporations and a variety of local officials, began what the parties describe as a "letter-writing campaign" but is better described as a far-reaching, concerted effort to enlist the efforts of state and federal officials to prevent Creek from building a rent-supported apartment complex in Westhaven. The motive, we assume for purposes of deciding this appeal, was racial.

On July 1, 1980, Creek had transferred his interest in the development to Pheasant Ridge Venture, a limited partnership in which he retained a 90 percent share as sole general partner, thus giving up 10 percent of his interest. He claims that he was forced to do this by the delays brought about by the defendants' unlawful behavior. A couple of months later Pheasant Ridge Venture transferred its interest to a joint venture with Shell Development Corporation. The joint venture, called PRV/Shell, reapplied for rent support, finally obtaining the necessary financial commitments in March 1983. Construction of the apartment complex was begun then and completed sometime before the end of 1993 (the record is unclear exactly when). PRV/Shell was permitted to intervene as a plaintiff in Creek's federal suit and eventually settled its claims for $1 million, out of which Creek, by virtue of his interest in the partnership, received some $136,000. The settlement agreement reserved "the individual claims not asserted or which later may be asserted by J. Fred Creek."

Creek contends that the complex as eventually built was smaller than it would have been but for the defendants' conduct (only 176 units) and less profitable. He seeks by way of damages the difference between the financial benefits that would have accrued to him had the defendants not delayed the project and the more modest though not negligible benefits that did accrue to him. He claims that the reduction in the size and profitability of the venture reflected, in part, changes in federal law. But he cannot recover damages for any lost profit that is due to those changes even if, as he also argues, he would have gotten the project under way before the changes went into effect had it not been for delay caused by the defendants' unlawful acts. Causation in the law is not to be equated to "but for" causation. E.g., *Siefken v. Village of Arlington Heights*, 65 F.3d 664, 666 (7th Cir. 1995); *United States v. Marlatt*, 24 F.3d 1005, 1007 (7th Cir. 1994); *Brackett v. Peters*, 11 F.3d 78, 82 (7th Cir. 1993). The delays did not make it more likely that federal law would change adversely to

Creek. Therefore those changes cannot be deemed "caused" by the defendants, because, to count as a cause, an act must both be a necessary condition (but-for cause) of the result *and* make the result antecedently more likely to occur. *Id.* at 82; *United States v. 1990 Toyota 4Runner*, 9 F.3d 651, 652 (7th Cir. 1993). Creek's claim for damages caused by the changes in law would have merit, therefore, only if a delay in the project was itself a cause of legal changes adverse to him. For in that case the delay *would* have made it more likely that Creek would be harmed by changes in the law; it would not have been just a necessary condition, a but-for cause, of that harm.

The district judge, however, did not merely throw out part of Creek's damages claim; she threw out Creek's entire suit. The ground was res judicata. The district judge believed that Creek's only viable claim was the claim that he had asserted in the state court suit filed in 1979. That suit had been concluded by the entry of a final judgment on April 14 of the following year. Creek had actually requested damages in that suit, though he later abandoned that request. Neither the request for damages nor its abandonment has any significance to the issue of res judicata. You cannot split a claim into a request for damages and a request for injunction and litigate each in a separate suit. *Torres v. Rebarchak*, 814 F.2d 1219, 1224 (7th Cir. 1987); *Meyers v. Kissner*, 576 N.E.2d 1094, 1100 (Ill. App. 1991), rev'd on other grounds, 594 N.E.2d 336 (Ill. 1992); *Restatement (Second) of Judgments* § 24(1) and comment a (1982). To divide a claim in that way is precisely the vice against which the doctrine of res judicata, in its sense of claim preclusion (as distinct from issue preclusion, or in an older terminology collateral estoppel) is directed.

But that is provided that you can obtain both forms of relief in one suit. If, when the claim arises, the amount of damages cannot be quantified, then you can delay bringing your suit for damages until they can be quantified. E.g., *Brunswick Corp. v. Riegel Textile Corp.*, 752 F.2d 261, 271 (7th Cir. 1984); *Ohio-Sealy Mattress Mfg. Co. v.*

Sealy, Inc., 669 F.2d 490, 494 (7th Cir. 1982); *Meekins v. United Transportation Union*, 946 F.2d 1054, 1058 (4th Cir. 1991). We cannot find an Illinois case that says this in so many words, and it is Illinois law that determines the preclusive effect, in this federal suit, of an Illinois judgment. 28 U.S.C. § 1738. There is even some old law in Illinois to the effect that the plaintiff in a suit for breach of an employment contract cannot sue more than once and therefore must wait until the term of the contract expires before he can sue if before then his full damages would be speculative. *Doherty v. Schipper & Block*, 95 N.E. 74, 76 (Ill. 1911); *Lewis v. Loyola University*, 500 N.E.2d 47, 52 (Ill. App. 1986). The current validity of the rule is open to question, however, see *Gasbarra v. Park-Ohio Industries, Inc.*, 655 F.2d 119, 122 (7th Cir. 1981), and there is no indication that the Illinois courts would extend the principle beyond the employment setting. We have even found an Illinois case in which res judicata is said not to apply in the case of a continuing or recurrent wrong, *Airtite v. DPR Ltd.*, 638 N.E.2d 241, 244 (Ill. App. 1994), and this, as we are about to see, when properly qualified, is just another way of saying that you can bring successive suits if you cannot get complete relief in one suit, and describes Creek's second suit exactly.

Not only when the state court suit was filed in 1979 but also when it was concluded in April of 1980, and at all times in between, Creek knew that he had lost valuable time but he could not estimate his full damages because he did not know when he would, at last, obtain the permit and the necessary federal financing and thus be able to go forward with the project. He could not—or at least there is no indication that he did—know that in July of 1980 he would have to abandon his hope of developing the apartment complex all by himself and bring in a 10 percent partner, thereby surrendering 10 percent of the profits from the project. Of course, if he surrendered this expectation for a commensurate present-value sum, he would no more be injured than any other entrepreneur who decides to share risk and reward by selling a piece

of his enterprise. But we must assume in the present posture of the case that he received inadequate consideration because of his distressed circumstances brought about by the defendants' conspiracy.

In a case of continuing injury the victim can bring successive suits unless it is feasible (as in a personal-injury suit for lost earnings caused by a permanent disability) to quantify the entire future damages and reduce them, through discounting, to a present value that can then be awarded to the plaintiff in a lump sum as his damages. That was not the case here, so Creek was entitled to bring a fresh suit even if the conduct complained of in it was the same conduct complained of in the state court suit. *Id.* at 244; *Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 745 F.2d 441, 448-50 (7th Cir. 1984); *Restatement, supra*, § 26(1)(e).

There is an alternative basis for not treating the first judgment as res judicata—that the second (that is, the present) suit challenged unlawful acts committed *after* the first suit, and hence is based on different facts, see *LaSalle National Bank v. County of DuPage*, 856 F.2d 925, 931-33 (7th Cir. 1988), facts, moreover, that could not have been made the basis (or a basis) of the first suit because they did not yet exist. But for this to signify requires that those acts have resulted in injury beyond that caused by the acts complained of in the first suit. Creek cannot obtain damages without proving injury and, the project having been completed, damages are all he is seeking. The district judge thought that Creek could not prove injury, and her conclusion has common-sense appeal if, as the defendants argue, Creek cannot obtain damages for any injury that occurred after July 1, 1980, when he transferred his interest in the development to the first joint venture. The only fresh acts by the defendants between April 14, 1980, and July 1 of that year were the Village's refusal to issue the permit notwithstanding a court order and the Homeowners Association's lawsuit. The Association is no longer a party but the Village as

a coconspirator would be liable for the Association's acts committed within the scope of the conspiracy. The Association's lawsuit is claimed to be such an act. Could these acts have precipitated Creek's decision to give up 100 percent ownership of the project? Probably not, but no stronger statement is possible and this one is not strong enough to justify summary judgment for the defendants. On April 14 it must have seemed to Creek that the last obstacles to HUD financing and the commencement of the project had been cleared away. When a month later the Village had not complied with the court order and the Homeowners Association had sued HUD to block the financing, imminent commencement was no longer in the cards. Granted, if negotiations for transferring Creek's interest to a partnership had begun before these untoward events, any inference that the events had caused the transfer would be greatly undermined. But apparently the transfer was a spur of the moment affair, and there is some possibility that the spur was the defendants' continued, pertinacious, last-ditch efforts to thwart Creek.

We have focused on events between April 14, 1980, and July 1, 1980, for Creek must prove that he was injured in consequence of those events in order to counter the defense of res judicata by showing that he was injured by wrongful conduct that occurred after the final judgment in his first suit. But that is only his alternative counter to the defense of res judicata. His main counter, which we also found meritorious, is that the first judgment was not res judicata because damages could not yet be quantified, and this means that he can base his claim for damages on conduct that occurred before as well as after April 14, provided it was before July 1.

Creek would be in even better shape if, as he argues, his right to seek damages is not cut off at July 1, 1980. If Pheasant Ridge Venture were a corporation, this argument would of course fail. A shareholder has no right to seek damages for an injury to the corporation, even if he is the sole shareholder. *Carney v. General Motors Corp.*, 23 F.3d 1154, 1157 (7th Cir. 1994). But the same

thing is true, it turns out, of a partnership. Under the law of Illinois—which determines capacity to sue in this case because the case was brought in a federal district court in Illinois, Fed. R. Civ. P. 17(b)—a partner may not sue individually to recover damages for an injury to the partnership, even though a partnership is a thinner veil between the enterprise and its owners. *Sindelar v. Walker*, 27 N.E. 59 (Ill. 1891). This is the general rule, not anything peculiar to Illinois. E.g., *Vinal v. West Virginia Oil & Oil Land Co.*, 110 U.S. 215 (1884); *Crystal Copper Co. v. Gaido*, 5 F.2d 881, 882 (9th Cir. 1925). We do not believe that it is affected by the fact that Pheasant Ridge Venture was a limited partnership with only one general partner—who happened to be Creek. The only difference between a limited partnership and an ordinary partnership (that is, a partnership with only general partners) is that the general partner in the limited partnership has unlimited liabilities while the limited partners, as the name implies, have only limited liabilities, that is, liabilities limited to their investment in the partnership. 805 ILCS 210/303(a). We do not see how this difference bears on the right to sue.

A partnership did sue here—Pheasant Ridge Venture's successor, PRV/Shell, was a plaintiff in this suit until it settled with the defendants. But *Creek's* right to seek damages terminated on July 1, 1980, though he remains free, as we have said, to show if he can that the loss he incurred when he gave up his 100 percent share in the project on that day was caused by unlawful acts committed by the defendants before the earlier of either July 1, 1980, or the date on which he decided to form the limited partnership and give away 10 percent of the partnership to a limited partner or partners.

But all this is on the assumption that res judicata is the only possible basis for the dismissal of Creek's suit. The defendants argue as is their right that there are alternative grounds, grounds not reached by the district judge but not waived and therefore available to support the judgment if they are good grounds. The only ground that

has any possible merit, so the only one we shall discuss, is that the municipal defendants were privileged by the speech and petition clauses of the First Amendment to oppose Creek's development by lobbying state and federal officials and by suing HUD to prevent the provision of rent subsidies. The defendants argue that the fact that the motive for these efforts was racial, as we must assume it was, is irrelevant.

We need not decide whether the lobbying, the "letter-writing campaign," was privileged, because we have already held that Creek's claim for damages ended no later than July 1, 1980, and the campaign did not begin until the following month. That leaves the suit brought by the Homeowners Association. We noted earlier that although the Association is no longer a defendant, the other defendants remain potentially liable for its acts, as its coconspirators.

A lawsuit can be a form of constitutionally protected petition for the redress of grievances. E.g., *McDonald v. Smith*, 472 U.S. 479, 484 (1985). And, odd as it may seem, a racial motivation, to the extent that it lent an ideological hue to the lawsuit, could actually strengthen the case for regarding it as a form of petition for redress of grievances or as an exercise of freedom of speech. Cf. *NAACP v. Button*, 371 U.S. 415 (1963); *National Socialist White People's Party v. Ringers*, 473 F.2d 1010, 1015 (4th Cir. 1973) (en banc). Suits that are objectively baseless, that is, frivolous suits, as distinct from colorable suits brought in bad faith, are not constitutionally protected. *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 113 S. Ct. 1920, 1928 (1993). But there is no indication that the Homeowners Association's suit was frivolous.

Nor is it out of the question that a municipality could have First Amendment rights. This question looms as critical because of the contorted procedural posture of the case. If the Homeowners Association's suit was not frivolous, that gets the association off the hook but it is already off the hook because it is no longer a defendant. Immunities are personal. A conspirator does not acquire

a coconspirator's immunity. *Dennis v. Sparks*, 449 U.S. 24, 29 (1980); *Goldschmidt v. Patchett*, 686 F.2d 582, 585 (7th Cir. 1982); *Davis v. Bayless*, 70 F.3d 367, 374 (5th Cir. 1995). The Village of Westhaven cannot shelter behind the Homeowners Association's First Amendment immunity, but must establish its own First Amendment immunity, if it can. Otherwise it would be able to achieve indirectly, by fomenting a private litigation, what it could not achieve directly by bringing its own suit to block Creek from building a project that would attract black people to Westhaven.

Only a few cases address the question whether municipalities or other state subdivisions or agencies have any First Amendment rights. All but one, and that not a case against a municipality, answer "no." *Columbia Broadcasting System, Inc. v. Democratic National Comm.*, 412 U.S. 94, 139 (1973) (concurring opinion); *Warner Cable Communications, Inc. v. City of Niceville*, 911 F.2d 634, 638 (11th Cir. 1990); *NAACP v. Hunt*, 891 F.2d 1555, 1565 (11th Cir. 1990); *Student Government Ass'n v. Board of Trustees*, 868 F.2d 473, 481 (1st Cir. 1989); see also *Estiverne v. Louisiana State Bar Ass'n*, 863 F.2d 371, 379 (5th Cir. 1989). Contra, *Nadel v. Regents of University of California*, 34 Cal. Rptr. 2d 188, 197-98 (Cal. App. 1994). The question is an open one in this circuit, and we do not consider the answer completely free from doubt. For many purposes, for example diversity jurisdiction and Fourteenth Amendment liability, municipalities are treated by the law as if they were persons. *Monell v. Department of Social Services*, 436 U.S. 658, 690 (1978); *Moor v. County of Alameda*, 411 U.S. 693, 717-18 (1973). There is at least an argument that the marketplace of ideas would be unduly curtailed if municipalities could not freely express themselves on matters of public concern, including the subsidization of housing and the demographic makeup of the community.

To the extent, moreover, that a municipality is the voice of its residents—is, indeed, a megaphone amplifying voices that might not otherwise be audible—a curtailment of its

right to speak might be thought a curtailment of the unquestioned First Amendment rights of those residents. See Meir Dan-Cohen, "Freedoms of Collective Speech: A Theory of Protected Communications by Organizations, Communities, and the State," 79 *Calif. L. Rev.* 1229, 1261-1263 (1991); cf. *Student Government Ass'n v. Board of Trustees*, *supra*, 868 F.2d at 482. Thus if federal law imposed a fine on municipalities that passed resolutions condemning abortion, one might suppose that a genuine First Amendment issue would be presented. Against this suggestion can be cited the many cases which hold that municipalities lack standing to invoke the Fourteenth Amendment against actions by the state. E.g., *Coleman v. Miller*, 307 U.S. 433, 441 (1939); *Williams v. Mayor & City Council of Baltimore*, 289 U.S. 36, 40 (1933); *City of East St. Louis v. Circuit Court for the Twentieth Judicial Circuit*, 986 F.2d 1142, 1144 (7th Cir. 1993). But it is one thing to hold that a municipality cannot interpose the Fourteenth Amendment between itself and the state of which it is the creature, *Anderson v. City of Boston*, 380 N.E.2d 628, 637-38 (Mass. 1978), appeal dismisssed for want of a substantial federal question, 439 U.S. 1060 (1979), and another to hold that a municipality has no rights against the federal government or another state. *Township of River Vale v. Town of Orangetown*, 403 F.2d 684, 686 (2d Cir. 1968), distinguishes between these two types of case.

Even if municipalities do have First Amendment rights, however, a question we need not decide, we do not think they have the right to foment, whether through speech or otherwise, governmental discrimination on grounds of race. The "or otherwise" is of course the simpler case, as many cases hold that states may not take actions that encourage private racial discrimination. E.g., *Reitman v. Mulkey*, 387 U.S. 369, 378-80 (1967); *Anderson v. Martin*, 375 U.S. 399, 402-04 (1964); *Sherman v. Community Consolidated School District 21*, 8 F.3d 1160, 1168 (7th Cir. 1993); *Griffith v. Bell-Whitley Community Action Agency*, 614 F.2d 1102, 1109 (6th Cir. 1980).

At argument we put to the Village's lawyer the following hypothetical case, which is close enough to the facts

alleged by Creek to assist our analysis. Illinois sheriffs are independent of county government; and suppose the county executive, acting in his role as the maker of policy for the county government, writes the sheriff of the county urging him not to hire any black deputy sheriffs. The sheriff, though not bound to follow the county executive's advice, is persuaded by it and therefore refuses to hire blacks. Blacks not hired because of this decision sue the county government, alleging racial discrimination in violation of the Fourteenth Amendment. We do not think that the county could interpose the First Amendment as a defense. Speech by government, even when not cast in the form of a command, even when addressed to another organ of government that is not subordinate to it, as in our hypothetical case, cannot be equated for all purposes to speech by an individual. It remains an official act, and when its purpose and tendency are, as alleged here, to promote discrimination that violates the Fourteenth Amendment, so too does the act. A contrary conclusion would permit government to undermine the duties that the Constitution imposes upon it and would thus be infected by the same vice that has persuaded judges not to allow a municipality to use the Fourteenth Amendment as a shield against the state that has created and under state law controls it. We are mindful that *NAACP v. Hunt, supra*, held that flying the Confederate flag from the Alabama state capitol did not violate the Fourteenth Amendment. But the flag's effect in encouraging the violation of the equal protection clause was tenuous at best, whereas here the Village's litigation and lobbying activity is alleged to have been motivated solely by racial prejudice and to have had as its sole object the exclusion of black people from the Village.

We need not decide how far the principle that the Fourteenth Amendment does not shield the advocacy of racial discrimination by municipalities binds the municipality's officials themselves. We suppose a public official campaigning for reelection has considerable rights of free speech short of incitement, cf. *Joyner v. Whiting*, 477 F.2d 456,

461-62 (4th Cir. 1973), though perhaps fewer than a candidate who has no law enforcement responsibilities. Several of the Village of Westhaven's officials have been joined as defendants, but there is no discussion in the briefs (and the issue did not arise at argument either) of their rights under the First Amendment.

To summarize:

1. Creek's suit against the defendants who remain in the suit is not barred by res judicata or by inability to prove injury.

2. The suit against the Village is not barred by the First Amendment, either, and whether the officials of the Village who have also been joined as defendants have a First Amendment defense cannot be determined on the record before us.

3. The suit should not have been dismissed, and the judgment dismissing it must be reversed.

4. But Creek cannot obtain damages (a) for any injury that occurred after July 1, 1980, because the right if any to such damages belongs to other entities, or (b) for any damages resulting from changes in federal law, because those damages were not caused in a legal sense by the defendants' unlawful conduct.

REVERSED AND REMANDED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 26, 1996

Before

Hon. Richard A. Posner, Chief Judge
Hon. John L. Coffey, Circuit Judge
Hon. Walter Jay Skinner, District Judge*

J. FRED CREEK,

Plaintiff-Appellant,

No. 95-1465 v.

VILLAGE OF WESTHAVEN, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 83 C 1851—Ann Claire Williams, *Judge.*

ORDER

On April 2, 1996, defendants-appellees filed petitions for rehearing. All the judges on the original panel have voted to deny the petitions. The petitions for rehearing are therefore DENIED.

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* Hon. Walter Jay Skinner of the District of Massachusetts, sitting by designation.

App. 15

[Dated January 13, 1987]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

J. FRED CREEK, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 83 C 1851
	)	
	)	
VILLAGE OF WESTHAVEN, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

This matter is before the court on motions for judgment on the pleadings filed by certain defendants. There are two complaints in this action, one filed by plaintiffs Fred Creek and Terracom Development Group, Inc. (the "Creek Complaint"), and the other filed by plaintiff-intervenor Shell Development Corporation (the "Shell Complaint"). Both complaints contain essentially identical allegations. Counts I through V of each complaint allege violations of certain constitutional rights, and are brought pursuant to various sections of the Civil Rights Act, 42 U.S.C. §§ 1981-1986. The remaining counts are pendent claims based on state law.

FACTS

The allegations of the complaint reveal the following facts. Creek and intervenor Shell are general partners of Illinois limited partnerships which were formed to

develop air operate Pheasant Ridge Apartments and Hunter Apartments. Defendant Village of Westhaven (the 'Village') is a municipality, located in Cook County, Illinois; the Village is 98% white with no black residents. Certain present and former members of the Board of Trustees of the Village of Westhaven are named as defendants in both their individual and official capacities. The complaints also name James O'Brien, the Mayor of Westhaven, as a defendant.

The Pheasant Ridge and Hunter Apartments are located on land that had previously been an unincorporated area zoned by Cook County. In 1975 the predecessor-in-interest to Shell and Creek ("the developer") sought to have the property annexed to and zoned by the Village in order to develop the property for multi-family residences. After many meetings and public hearings, the Village of Westhaven Planning Commission recommended to the Board of Trustees that it accept the plans for annexation and zoning worked out by the Planning Commission and the developer ("the Pre-Annexation Agreement"). This the Board of Trustees did on January 21, 1976. Soon thereafter the 'Final Plans' for the development were also approved.

In January 1979 the Department of Housing and Urban Development ("HUD") notified the Village that the developer had applied for Section 8 rental subsidies for the Pheasant Ridge and Hunter Apartments. The developer also sought mortgage financing and insurance from HUD. Under laws governing such financing, the developer had to comply with federal Fair Housing laws and an affirmative action marketing plan. Also, use of Section 8 rental subsidies required the developer to make units available to a certain number of persons eligible for

Chicago Housing Authority housing; most of such persons are black. As a result of these requirements, the housing development would be racially integrated.

After notification of the developer's intent to use HUD financing and Section 8 subsidies, the Village, its mayor, and the Board of Trustees embarked on a campaign to prevent the construction of the Hunter and Pheasant Ridge Apartments so long as the possibility existed that subsidized and black tenants would occupy some of the units. Part of the campaign included attempts to influence HUD to reject the developer's application for HUD financing and Section 3 subsidies. The campaign also included delays in granting the building permit.

In August 1979, the developer filed a suit in the Circuit Court of Cook County seeking a writ of mandamus requiring the village to approve the Final Plans and issue the building permit. Further, the suit sought a declaratory judgment that the developer and any successors-in-interest were entitled to use the property as planned and were entitled to the issuance of the building permits. On April 14, 1980, the state court entered a Final Judgment Order in favor of the developer. Specifically, the court declared that the developer was entitled to use the property as planned and was entitled to the building permits. The Order enjoined the Village and its agents from interfering with the construction of the development.

Despite the April 14th Order, the Village continued to drag its feet in issuing the building permits. As a result, on June 25, 1980, plaintiffs in the state court action brought a contempt proceeding against the Village. After a hearing, the parties entered into an Agreed Order on

August 28, 1980, which required the Village to deposit building permits with the court; to be released by the court after the parties complied with certain conditions set forth in the Order.

Although the plaintiffs undertook numerous actions to comply with the conditions of the Agreed Order, the Village continued to delay the issuance of the building permits. Therefore, on March 28, 1982, the plaintiffs filed a motion with the state court to enforce the Agreed Order of August 28, 1980. After a hearing, the court entered an order requiring the Village to deposit the building permits by May 11, 1982. May 11th came and went, but the Village did not deposit the permits; the state court therefore entered an Order on May 17, 1982 stating that the Order itself constituted the necessary building permits. The Village did not deposit the actual permits until November 23, 1982.

Motion for Judgment on the Pleadings

The Village of Westhaven, James O'Brien and members of the Board of Trustee (the "Westhaven defendants") move to dismiss all seven counts of both complaints on the basis that those counts are barred by the previous state court judgments. In their opening brief these defendants argued that the principle of *res judicata* precludes this action. They contend that plaintiffs' allegations that defendants refused to issue the building permits allege the same conduct at issue in the state court lawsuit. Plaintiffs did not but could have sought money damages in that suit. Since they did not, they are now barred from doing so here.

Plaintiffs responded by pointing out that their complaints proceed largely on the basis of conduct which occurred after the April 14, 1980 Order. Moreover, they say they could not have sought money damages in the contempt proceedings enforce that Order, therefore the state court's subsequent orders do not bar their current suit for money damages.

Having realized the validity of plaintiffs' arguments, defendants now contend that *res judicata* bars only those damages incurred prior to the entry of the April 14, 1980 Order. For damages after that date, defendants now argue that plaintiffs' claims are barred by the doctrine of "issue preclusion". The argument, as best the court can understand it is as follows. Under the terms of the Agreed Order entered on August, 28, 1980, plaintiffs agreed not to bring any action against the Village or its officials for damages for any delay in construction of the apartments. The Agreed Order therefore precludes the recovery of any damages accruing between April 1980 and August 1980. It appears defendants are arguing that, because plaintiffs agreed not to bring any action for damages for any delay in construction, that "issue" has already been litigated and plaintiffs are thus precluded from relitigating it. In addition, the May 17,1982 Order, which proclaimed that the Order was itself the building permits, precludes plaintiffs from seeking damages from August 1980 through May 17, 1982. Defendants do not disclose what issue was determined by the May 17, 1982 Order.

Under Illinois law the doctrine of collateral estoppel, or issue preclusion, bars relitigation of issues in a subsequent proceeding if: (1) the party against whom the estoppel is asserted was a party to the prior litigation;

(2) the issue is same as that involved in the prior action; (3) the issue was actually litigated and judicially determined in the prior action; and (4) the judgment in the prior action was dependent upon the determination made of the issue. *County of Cook v. Midcon Corp.*, 773 F.2d 892, 898 (7th Cir. 1985). The doctrine applies only if all four of these criteria are met. *Whitney v. Seibel*, 676 F.2d 245, 248 (7th Cir. 1982).

The court rejects defendants' issue preclusion argument for two reasons. First, defendants do not articulate how that doctrine applies to this case, and the court will not undertake the exercise of doing so for them. Second, to the extent defendants imply that the Agreed Order precludes plaintiffs from seeking damages, the Order does not establish as a fact that plaintiffs intended it as a determination of any question of law or fact at issue in the state court proceedings. Nor have defendants cited any case law to support the proposition that an agreed order in one case can preclude the relitigation of issues involved in that case even though there has been no showing of the parties' intent in this respect. In contrast, plaintiffs do cite a case for the general proposition that the presumption is that an issue resolved by stipulation or concession in one suit is not conclusively established in a subsequent suit on a different cause of action unless it is clear that the parties so intended. *Anderson, Clayton &, Co. v. U.S.*, 562 F.2d 972, 993 (5th Cir. 1977); *see also* IB *Moore's Federal Practice*, § 0.444(4) at 820 (collateral estoppel should not apply where prior judgment was by consent or stipulation unless it appears that parties intended prior judgment to be conclusive of particular issue). Therefore, defendants are not entitled to judg-

ment on pleadings based on their issue preclusion argument.[1]

Defendants have also moved for judgment on Counts III and V on a basis different from their estoppel argument. Count III is brought pursuant to 42 U.S.C. § 1985(3) and alleges that defendants conspired to violate plaintiffs' rights to equal protection and due process under the fifth, thirteenth, and fourteenth amendments to the Constitution. As acts in furtherance of the conspiracy, plaintiffs allege that the Westhaven defendants refused to approve the Final Plans and to issue building permits. In addition, from January 1979 to January 1982, defendants opposed the federal financing of the development in correspondence to and meetings with certain state and federal officials, such as HUD, the Illinois Housing Development Authority, former United States Senator Charles Percy and David Stockman, former Director of the Office of Management and Budget. Shell Complaint ¶ 74; Creek Complaint ¶ 35. Count V is based on the same factual allegations made in Count III, but seeks recovery under a theory of tortious interference with prospective economic advantage. Defendants contend that the activities alleged in these counts is protected under the *Noerr-Pennington* doctrine.

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[1] The court noted that defendants continue to maintain that the doctrine of *res judicata* bars plaintiffs from seeking damages for actions occurring prior to the entrance of the April 14, 1980 Order. While that may be so, *see Hagee v. City of Evanston*, 729 F. 2d 510, 512 (7th Cir. 1980), that does not entitle them to judgment on the pleadings as to any particular count of the complaint. By use of the *res judicata* doctrine, defendants really seek to limit plaintiffs' damages, not to bar any particular "claim". This effort is more properly the subject of a motion *in limine* and defendants are not barred from raising at the proper time the issue of pre-April 1980 damages.

The *Noerr-Pennington* doctrine is the result of two Supreme Court cases, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). In these cases the Court held that conduct protected by the first amendment right to petition the government for redress of grievances cannot form the basis of a private antitrust suit for damages. In *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1333 (7th Cir.), *cert. denied*, 434 U.S. 975 (1977) the Seventh Circuit applied *Noerr-Pennington* and held that the first amendment similarly immunizes such "petitioning activity" from liability from suits brought under Section 1985(l) of the Civil Rights Act, 42 U.S.C. § 1985(l). Defendants urge that the activity alleged in Counts III and V is immune from Section 1905(3) liability as well.

Plaintiffs attack defendants' first amendment defense on several grounds: (1) the defense does not apply where a governmental body is one of the alleged conspirators; (2) Counts III and V are based not just on petitioning activities but also on conduct not protected by the first amendment; (3) the statements made to the various government officials by defendants were baseless, untrue, and misleading and therefore unprotected by the first amendment; (4) the petitioning activity was part of an overall conspiracy to violate plaintiffs' civil rights and, as such, unprotected; and (5) the Village is not a "person" within the meaning of the fourteenth amendment and therefore has no protectable first amendment right to petition. Each of these arguments will be addressed in order.

The first argument, that the right to petition defense does not apply where a government entity is one of the

conspirators, is the so-called 'co-conspirator' exception to the *Noerr-Pennington* doctrine. One of the earliest cases to apply this exception was *Duke & Company, Inc. v. Foerster*, 521 F.2d 1277, 1281-82 (3rd Cir. 1975). That case involved a claim under the antitrust laws based on a conspiracy among three corporations, a private individual, and three municipal corporations. The plaintiff alleged that the defendants conspired to boycott the sale of the plaintiff's malt beverages at three public facilities owned by the municipal corporations. These municipal corporations determined who could sell beverages from concession stands at the three municipal facilities. The Third Circuit held that the conspirators were not protected by the first amendment since the municipal entities were themselves part of the unlawful scheme. *Id.* at 1282.

For several reasons, this court declines to adopt the co-conspirator exception articulated in *Duke*. First, the weight of authority has declined to recognize such an exception. *See, Mercy-Peninsula Ambulance v. County of San Mateo*, 592 F. Supp. 956, 965-66 (N.D. Calif. 1984) and cases cited there. Second, whatever validity the co-conspirator exception has in the antitrust context, it has never been applied in a civil rights action, an area with policy concerns different from those of the antitrust laws. And, third, the municipal entities in *Duke* were themselves responsible for making the decision as to who could sell beverages. The municipal defendants in this case were not responsible for the final decision over whether plaintiffs would receive HUD financing. According to the complaints, HUD, with input from certain state officials, had the authority to make the decision, and that is why defendants addressed their correspon-

dence to HUD and other federal and state officials. Therefore this case is distinguishable from *Duke*.

Next plaintiffs contend that because Counts III and V alleged that defendants engaged in conduct other than protected petitioning activity, defendants are not entitled to judgments on the pleadings. The court agrees. Both counts allege that the activities the Westhaven defendants undertook in furtherance of the conspiracy included the refusal to issue building permits and refusal to approve the Final Plans. This activity is not protected by the first amendment. This finding could properly end the court's inquiry into the merits of defendants' motion for judgment on the pleadings as to Counts III and V. However, these counts also are based on facts which allege conduct that defendants contend is protected petitioning activity. Thus, since the parties have raised the issue of whether the petitioning activity can form the basis of plaintiffs' civil rights claim, the issues ought to be decided now, in advance of trial. Therefore, the court now turns to plaintiffs' remaining challenges.

As their third reason for why the petitioning activity should not be immunized from civil rights liability, plaintiffs argue that the statements made by defendants to the various government officials were false and without merit. Here plaintiffs really make two arguments. One, they contend that, because the statements were without a basis in fact, they fall within the "sham" exception to the *Noerr-Pennington* doctrine. Two, false statements are not protected by the first amendment.

The "sham" exception to the *Noerr-Pennington* doctrine was first recognized by the Supreme Court in *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508 (1972). In that case the court expanded *Noerr-Pennington*

beyond the right to petition the government, and held that the first amendment also protects the right of access to the courts. 404 U.S. at 510-11. In doing so, the court also recognized an exception—litigation which is abusive of the adjudicative process is not protected. This is the so-called "sham" exception.

While the full contours of the sham exception have yet to be delineated, the Seventh Circuit has made clear that, in order for the sham exception to apply, the defendant must show that plaintiff undertook litigation without either a good faith belief in its merits or a desire to obtain a favorable judgment. *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 472 (7th Cir. 1982). The complaints here contain no facts which suggest that defendants did not desire to obtain a favorable decision from HUD. To the contrary, the complaints allege that defendants' petitioning activities were all directed toward convincing HUD to reject plaintiffs' application for HUD financing and Section 8 subsidies. That defendants' ultimate goal was to prevent construction of housing with black and low income tenants does not change that fact.

Nor is the court persuaded by the argument that, because defendants' statements were false, their activities are unprotected. The *Stern* court explicitly rejected such an argument and held that petitioning activity is protected even if it includes making statements, knowing they are false. 547 F.2d at 1345 (knowing falsity is easily alleged, and subjective considerations like knowledge are not amenable to resolution by summary judgment; thus defendants in civil rights cases would be forced to trial with a resultant chilling effect on the exercise of the right to petition). Accordingly, plaintiffs' there challenge also fails.

Next plaintiffs argue that otherwise protected activity falls outside the first amendment if the activity is part of an overall conspiracy to violate the civil rights laws. For this proposition, plaintiffs rely upon *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1265 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983). But *Clipper Express* cannot be read as broadly as plaintiffs contend. The Ninth Circuit merely held that protected activity, as part of the acts in furtherance of a conspiracy, does not shield the entire scheme from the antitrust laws; only the protected activity itself is shielded. With this the court agrees. That is why the court ruled elsewhere in this opinion that Counts III and V survive this motion for judgment on the pleadings because the counts allege activity other than the protected petitioning acts. But concomitantly, the court does not think that the presence of non-protected activity removes the first amendment shield from the petitioning activity. Hence, the court rejects the fourth argument insofar as it is an attempt to rebut defendants' entire first amendment defense.

Finally, the court turns to plaintiffs' last challenge to defendants' petitioning activity defense. In this challenge plaintiffs assert that the first amendment does not give the Village of Westhaven the right to petition other government entities.

The first amendment is made applicable to the states by the due process clause of the fourteenth amendment. *United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n.*, 389 U.S. 217 (1967). That clause protects "persons" from being deprived by the state of life, liberty or property without due process. Plaintiffs argue that municipalities are not "persons" within the meaning of

the due process clause. They cite two Illinois state court decisions as support. *Village of North Pekin v. Riviere*, 73 Ill.App.3d 1032, 392 N.E.2d 439 (1979); *People v. Valentine*, 50 Ill.App. 3d 447, 365 N.E.2d 1082 (1977). In both these cases the court held the political subdivisions of a state are not entitled to due process protections from acts of the state.

Defendants correctly point out that both these Illinois cases are distinguishable from this case. In those cases, the municipalities sought protection from their own states—the sovereigns who had created the municipalities. Here, however the Village asserts constitutional protections against liability to a private individual and a private corporation. Thus, *Riviere* and *Valentine* are not dispositive of the issue of whether the first amendment, by way of the fourteenth, affords protection municipalities from suits brought under federal law by private individuals.

In contrast, defendants rely on a number of other cases in support of their argument that a municipality is a "person" within the meaning of the fourteenth amendment due process clause. Most of these cases, however, are not helpful. In the first case defendants cite, *Cronin v. Lindberg*, 66 Ill.2d 47, 360 N.E.2d 360 (1976), the Illinois Supreme Court ruled that, while "ordinary" due process protections do not extend to local school boards and school districts, these entities may assert a denial of equal protection if they are members of a class being discriminated against. 300 N.E.2d at 363. Aside from the fact that the *Cronin* court recognizes (albeit in dictum) that municipal entities do not enjoy "ordinary" due process protections, the opinion is of little aid since the court there does not explain its equal protection holding in

terms of the issue presented here—whether a municipality is a "person" under the fourteenth amendment.

In two of the cases cited by defendants, the courts were faced squarely with the issue but declined to resolve it. *See Santa Clara, Cal. v. Andrus*, 572 F.2d 660, 675 (9th Cir. 1978) (court decided it was unnecessary in that case to resolve issue of whether municipality was a person under fifth amendment due process clause and instead merely assumed the municipality was a person); *Akron Bd. of Educ. v. State Bd. of Educ.*, 497 F.2d 1285, 1291 (6th Cir. 1972), *cert. denied*, 417 U.S. 932 (1974) (declined to decide whether school board was a "person" since suit was also filed in the name of the school superintendent who is a natural person). Defendants' reliance on *Monell v. Dept. of Soc. Serv. of City of N.Y.*, 436 U.S. 658 (1978) is also misplaced. That case holds only that a municipality is a person who may be sued under Section 1983.

Township of River Vale v. Town of Orangetown, 403 F.2d 684, 686 (2d Cir. 1968) is the only case defendants cite which holds that a municipality is a person within the meaning of the fourteenth amendment due process clause. That court, without citation to any authority, apparently concluded that, because a municipal corporation is like a private corporation for some purposes, it must also be a person under the due process clause.

The court is not persuaded by *River Vale's* conclusory reasoning. More persuasive is the analysis in *City of Sault Ste. Marie, Mich. v. Andrus*, 532 F. Supp. 157, 167-68 (D.C.D.C. 1980). In that case, although first holding that a municipality is a person within the meaning of the fifth amendment due process clause, on reconsideration the court held it was not. The court's analysis begins

with the Supreme Court's holding in *South Carolina v. Katzenbach*, which states:

> Some of these contentions may be dismissed at the outset. The word "person" in the context of the Due Process Clause of the Fifth Amendment cannot by any reasonable mode of interpretation, be expanded to encompass the *States* of the Union, and to our knowledge this has not been done by any court. (emphasis added).

532 F. Supp. at 167 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 323-4 (1966). Because a municipality is a creature of the state, the *Andrus* court reasoned, the municipality cannot be a "person" under the fifth amendment due process clause if its progenitor, the state, is not. *Id.* at 167. Moreover, the fact that the municipal corporation is a creature of the state, and thus cannot enjoy rights not possessed by the state, distinguishes the municipal corporation from the private corporation.

This court agrees with this reasoning. The due process clause provisions protect natural persons and private corporations, not government, from arbitrary actions by the sovereign. The notion that a political body created by the state enjoys protection, by virtue of the due process clause, from enforcement of the laws of its own or some other sovereign is not supported by either the case law or the language of the clause. As noted, the Supreme Court has so found as to the fifth amendment. There is nothing about either the facts of this case or the differences between the fifth and fourteenth amendment due process clauses that requires a different result with respect to the fourteenth amendment. Therefore, the court holds that the fourteenth amendment does not confer upon the Village of Westhaven a first amendment

shield from liability for petitioning activities.[2] To summarize the holding on the *Noerr-Pennington* defense, the court agrees that defendants are not entitled to judgment on the pleadings because Counts III and V allege activity other than petitioning activity. The court also finds that the Village of Westhaven enjoys no first amendment protection for any of its activity. However, plaintiffs' other attacks on defendants' *Noerr-Penninqton* defense fails.

For all the reasons discussed above, the Westhaven defendants' motion for judgment on the pleadings is denied.

E N T E R:

Ann Claire Williams, Judge
United States District Court

Dated: JAN 13, 1987

[2] The court recognizes that in an earlier opinion issued in this case Judge Plunkett dismissed two other municipal defendants from Counts II and V on the basis of *Noerr-Pennington*. See Memorandum Opinion and Order, Oct. 24, 1984. But this court respectfully disagrees with Judge Plunkett's implicit assumption that municipalities are covered by the due process clause. Moreover, Judge Plunkett did not address the issue of whether those defendants were persons or corporations.

App. 31

[Dated April 10, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

J. FRED CREEK, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 83 C 1851
	)	
	)	
VILLAGE OF WESTHAVEN, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiffs J. Fred Creek ("Creek"), *et.al.*, brought this action against defendants Village of Westhaven ("Westhaven"), *et al.*, pursuant to 42 U.S.C. §§1981-1986, 3601, and various state law claims. The plaintiffs, who are housing developers, seek damages from the defendants for allegedly delaying the construction of the plaintiffs housing projects. Plaintiff intervenor Shell Development Corporation ("Shell") now brings a motion to rename the intervening plaintiff pursuant to Federal Rule of Civil Procedure 17(a) and to amend the complaint to reflect the appropriate name of the plaintiff intervenor. The defendants also move for summary judgment on the § 1985(3) and the tortious interference with prospective business relations claims pursuant to Federal Rule of Civil Procedure 56(c). For the reasons stated below, Shell's motion to amend is granted. Defendant Orland Fire Protection District's ("OFPD") motion for summary judgment on the § 1985 claim is granted. Summary

judgment is denied on the § 1985 claim with respect to defendants Orland and Orland School District No. 135 ("OSD") and on the tortious interference claim with respect to defendants Orland, OFPD, and OSD.

Background

To clarify the relationships between the parties, a brief explanation of the chain of ownership of the development at issue in this case is required. The predecessor-in-interest to the plaintiffs in this case began developing plans for apartment complexes in approximately 1975. Plaintiff Creek purchased the development on January 1, 1980. On July 1, 1980, Creek conveyed his interest in the development to the Pheasant Ridge Venture ("PRV"). PRV then created a partnership with Shell ("the Shell/PRV partnership") on August 31, 1980 to acquire financing for, syndicate interests in, and to complete the development. PRV and Shell executed partnerships with Crane General, Inc. ("Crane") on August 31, 1982 named Pheasant Ridge Associates ("PRA") and Hunter Apartment Associates ("HAA") in anticipation of construction of the development. On March 7, 1983, revised partnership agreements were executed for both partnerships, granting partnership interests to Capital Housing Partners-CL, the entity that syndicated interests in the development. Pursuant to these revised agreements, PRA and HAA currently own and operate the development.

The developments at issue in this case, the Pheasant Ridge and Hunter Apartments, are located on land that had previously been an unincorporated area zoned by Cook County, Illinois. In 1975, the predecessor-in-interest to the plaintiffs sought to have the property annexed

and zoned by Westhaven in order to develop the property for multi-family residences. Westhaven was a municipality located in Cook County which was 98% white and had no black residents. After many meetings and public hearings, the Board of Trustees of Westhaven accepted the plans for annexation and zoning, and, shortly thereafter, the final plans for the housing development.

In January 1979, the Department of Housing and Urban Development ("HUD") notified Westhaven that the developer had applied for rental subsidies, insurance, and mortgage financing for the apartment complexes. Under laws governing such financing, the developer would be required to comply with federal Fair Housing laws and an affirmative action marketing plan. The use of the requested rental subsidies also would require the developer to make units available to a certain number of persons eligible for Chicago Housing Authority housing. Most of the eligible persons are black. As a result of these requirements, the housing development would be racially integrated.

The plaintiffs had also applied for mortgage financing and a construction loan from the Illinois Housing Development Authority ("IHDA"). This application, and subsequent amendments to it, remained pending before the IHDA during the time that the plaintiffs applied for and received HUD funding. IHDA eventually denied the plaintiffs' application for funding and the plaintiffs were forced to depend solely upon the HUD financing they received.

Following notification of the developer's intent to use HUD and IHDA financing, the plaintiffs claim that Westhaven, its Board of Trustees, and various other related organizations, such as defendants Orland, OSD, and

OFPD, began a campaign to prevent construction of the Hunter and Pheasant Ridge Apartments so long as the possibility existed that subsidized and black tenants would occupy some of the units.

In August 1979, when Westhaven refused to issue the building permits necessary for construction of the apartment complexes, the developer filed suit in the Circuit Court of Cook County seeking a writ of mandamus requiring Westhaven to approve the final plans and issue the requisite permits. On April 14, 1980, the state court entered a Final Judgment Order in favor of the developer, declaring that the developer was entitled to use the property as planned and to the building permits, and that Westhaven and its agents could not interfere with the development's construction.

When Westhaven continued to delay issuing the permits, the developer brought a contempt proceeding against Westhaven which resulted in an August 28, 1980 agreed order requiring Westhaven to deposit the permits with the court. The court was to release the permits to the plaintiffs after the parties complied with certain conditions set forth in the order. Because Westhaven still continued to delay the issuance of the permits, the state court, pursuant to a motion to enforce the agreed order, entered an order requiring Westhaven to deposit the permits by May 11, 1982. On May 17, 1982, the court entered an order stating that the order itself constituted the necessary building permits because Westhaven still had failed to deposit them with the court. On November 23, 1982, Westhaven finally deposited the permits with the court.

During this time period, many of the other defendants in this suit, including Orland, OSD, and OFPD, began a

letter-writing campaign to oppose construction of the development. For example, from October 1980 to February 1982, OSD met to coordinate its opposition and wrote letters against the development to such agencies as the IHDA and individuals such as Representative Edward Derwinski. Similarly, OFPD wrote a letter on October 16, 1980 to IHDA opposing the building of the apartment complexes because it claimed they would constitute fire hazards. From October 1980 to February 1982, Orland also sent letters to IHDA, HUD, former Senator Charles Percy, and others opposing the construction of the apartments for a variety of reasons.

Among other claims, the plaintiffs allege that the letter-writing campaign and Westhaven's continuous and improper denial of the building permits constitute acts in furtherance of a conspiracy to prevent the construction of the Hunter and Pheasant Ridge Apartments. The plaintiffs claim that the defendants intended to exclude low-income and minority tenants from residing in Westhaven and near Orland Park, and to exclude the children of such tenants from attending OSD. Pursuant to 42 U.S.C. § 1985(3), the plaintiffs allege that this conspiracy constituted an attempt to deny equal protection of the law and equal privileges and immunities secured by the Fifth, Thirteenth, and Fourteenth Amendments to the Constitution. The plaintiffs also allege that the attempts to prevent the financing of the project constituted a tortious interference with prospective economic advantage. The defendants now move for summary judgment on these claims. Plaintiff intervenor Shell also moves to rename the intervening plaintiff and to amend the complaint.

The Motion to Amend

On November 16, 1983, Shell filed its original intervening complaint. In this motion, Shell alleged that on August 31, 1980 it had formed a general partnership with Creek called PRA. Shell alleged that on August 31, 1982 Shell and Creek revised the PRA partnership and formed HAA. Shell asserted that due to its partnership interests in PRA and HAA, it held a legitimate interest in the development at issue in the suit filed by Creek against Westhaven. Shell maintained that it should be allowed to intervene in the action because any recovery obtained would be assets of its partnerships. The court granted Shell's motion to intervene.

Plaintiff intervenor Shell now moves the court to permit the substitution of the name "The Partnership between Shell Development Corporation and Pheasant Ridge Venture" for the intervening plaintiff and to amend the complaint to reflect this change. Under Federal Rule of Civil Procedure 17(a), every action must be prosecuted in the name of the real party in interest. Rule 17(a) further provides that:

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification for commencement of the action by, or joinder or substitution of, the real party in interest;-and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party In interest. Fed. R. Civ. P.17(a).

Federal Rule of Civil Procedure 15(c) also provides for the relation back of amended pleadings when the claim arises out of the conduct, transaction, or occurrence set

forth in the original pleading if, within the statute of limitations period, the opposing party has sufficient notice of the amendment such that he or she will not be prejudiced in maintaining his defense on the merits.

It is well settled that the Federal Rules of Civil Procedure are to be liberally construed to assure that claims proceed on the merits and to dispense with technical procedural problems. *Staren v. American National Bank & Trust Co. of Chicago*, 529 F.2d 1257, 1263 (7th Cir. 1976). In line with this reasoning, the Seventh Circuit has determined that amendments of the parties and to the pleadings should be freely allowed. *Id.* In *Staren*, the Seventh Circuit overturned the district court's determination that the individual plaintiffs could not amend the complaint to add their corporation as a party. The court held that such an amendment was permissible because the cause of action alleged by the corporation was identical to the cause of action alleged by the original plaintiffs and the defendants had sufficient notice of the corporation's claim. *See Id.* at 1263-64.

Following the Seventh Circuit's analysis in *Staren*, this court finds that Shell is entitled to amend the plaintiff intervenor's name and the complaint in this action. It is apparent from reading the original and amended complaints that the claims arise out of the same transaction. The only difference is that Shell wishes to substitute its claim for relief as a partner for its earlier claim for relief as an individual. As the court held in *Saul Stone & Co. v. Browning*, when the claim remains the same, dismissal on this basis is unwarranted. 615 F. Supp. 20, 21-22 (N.D. Ill. 1985).

Furthermore, as required under the Federal Rules of Civil Procedure, the defendants had sufficient notice of

Shell's role as a partner in the development of the Pheasant Ridge and Hunter Apartment complexes to adequately defend themselves. Shell's original motion to intervene clearly recognized Shell's role as a partner to Creek, and eventually other entities, in the development of the apartment complexes. *See* Shell's Motion to Intervene at ¶¶ 2, 3, 4, 7, 9. As Shell notes in its motion to amend, the defendants, in a motion for summary judgment submitted on October 23, 1985, also acknowledged that the plaintiffs were partners in partnerships created to develop the apartment complexes. This court also recognized this fact in its memorandum opinion and order issued on January 13, 1987. Similarly, Creek and Shell stipulated on July 9, 1991, that Shell and PRV formed a partnership on August 31, 1980.

However, defendants contend that Shell's extreme delay in bringing this motion to amend has been so prejudicial that the court should not allow it. This court recognizes that Shell originally brought its motion to intervene in 1983. However, the court finds that the delay in amending its name is not as prejudicial as the defendants contend. As the Seventh Circuit stated in *Staren*, the clarification of a party's name after the applicable statute of limitations has run is not significant "when the change is merely formal and in no way alters the known facts and issues on which the action is based." 529 F.2d at 1263. Although the defendants claim that additional discovery would be required due to the proposed amendment, the defendants have failed to explain what, if any, additional information they would require. As already noted, the known facts and issues of the causes of action in this case would not be affected. The only difference would be that the defendants would not need to address

their intended argument that Shell does not have an individual interest in the injury alleged in this case.

This court is aware, as defendants point out, that extreme delay in itself can be a sufficient basis for denying a motion to rename a party. In *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 838 F.2d 904, 908 (7th Cir. 1988), the plaintiff attempted to add a related cause of action to the complaint after ten years of litigation and with only six weeks to go before the trial was to begin. The Seventh Circuit found that the trial court did not abuse its discretion when it held that the plaintiffs extreme delay warranted denial of their motion to amend the complaint to include another related cause of action. *Id.* at 909. Significantly, the Court also commented that while the trial court may not have abused its discretion in denying the motion to amend, "it is hard to see what prejudice would have ensued from allowing the [plaintiffs] to add the extra string to their bow, especially when the trial was to be postponed for a substantial time." *Id.* at 908.

In this case, the plaintiff's delay is not prejudicial enough to alter this court's decision to allow the renaming of the intervening plaintiff. Unlike the plaintiffs in *Tamari*, who attempted to add an entirely new cause of action to the complaint, Shell is only attempting to alter the name of the intervening plaintiff in the instant case. The plaintiff in this case only seeks to amend a formality of the proceeding as opposed to the substantive amendment sought by the plaintiffs in *Tamari*. Furthermore, unlike the *Tamari* plaintiffs, Shell has not brought this motion immediately before the expected trial date. No trial date has even been set in this case.

In addition, Shell claims that the question of the plaintiff intervenor's proper role in the suit was never raised

until mid-1989. At that time, Shell informed the court that it would address the Rule 17(a) issue after the partnership formation motions were decided because there was no point in seeking a substitution of parties if the court ruled that no Shell/PRV partnership existed. Within a reasonable time after the court's ruling on the partnership formation issue, Shell filed this motion to amend. Given the requisite liberal reading of the Federal Rules of Civil Procedure, the defendants' notice of Shell's proper role in this case, and the fact that the requested change in the plaintiff intervenor's name does not alter any claims or create undue prejudice in this case, the court grants Shell's motion to rename the plaintiff intervenor and amend the complaint to reflect this change.

The defendants' contention that Shell does not have standing to sue them, even in its capacity as a partner, is misplaced. As Shell properly contends, the dissolution of the Shell/PRV partnership in March 1983 does not strip its general partners of the right to recover on the claims raised in this action. Under the Illinois Partnership Act, dissolution of a partnership still permits the partnership to wind up its affairs, including suing to enforce its rights. *See* 30 Ill. Rev. Stat. ch. 106½, ¶ 30; 30 Ill. Rev. Stat. ch. 30, ¶12.80; *Saltzber v. Fishman*, 123 Ill. App.3d 447, 462 N.E.2d 901, 905 (1st Dist. 1984). In addition, Shell adequately demonstrates how it could have been injured by the defendants' purportedly unconstitutional actions during that time period.[1] Therefore,

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[1] More specifically, Shell claims that the Shell/PRV partnership's inability to obtain IHDA financing as a result of the defendants' actions, caused it to seek HUD financing which was significantly more costly. Shell asserts that this financing sub-

(continued...)

the Shell/PRV partnership has standing to sue the defendants for their alleged racially-motivated opposition to the building of the apartment complexes following the August 31, 1980 formation, of the Shell/PRV partnership.

The Motion for Summary Judgment

A motion for summary judgment should be granted when there are no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ. P. 56(c). After the moving party makes a properly supported motion for summary judgment, the nonmoving party bears the burden of refuting the motion by setting forth specific facts showing the existence of a genuine issue of fact for trial. *Shlay v. Montgomery*, 802 F.2d 918, 920 (7th Cir. 1986). A genuine dispute regarding a material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby Co.*, 477 U.S. 242, 248 (1986). When assessing a motion for summary judgment, a court "must accept as true the nonmovant's evidence, must draw all legitimate inferences in the nonmovant's favor, and must not weigh the evidence or the

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[1] (...continued)
stantially reduced the Shell/PRV partnership's net syndication proceeds. Shell also claims that the defendants' conduct prevented its partnership from obtaining matched financing of a thirty-year mortgage and a thirty-year rental subsidy contract, rather than the forty-year mortgage and forty-year rental subsidy contract it eventually obtained. Shell contends that this result substantially diminished the value of the development and the Shell/PRV partnership's interest therein. *See* Shell's Reply Memorandum in Support of Motion To Rename Intervening Plaintiff and to File Amended Intervening Complaint at 3.

credibility of the witnesses." *Valentine v. Joliet Township High School District*, 802 F.2d 981, 986 (7th Cir. 1986). Based upon these standards, Orland, OFPD, and OSD claim that they are entitled to summary judgment on both the § 1985(3) and the tortious interference claims. These claims will be addressed separately below.

A. *The § 1985(3) Claim*

The plaintiffs allege that, pursuant to 42 U.S.C. § 1985(3), Westhaven, Orland, OFPD, OSD, and other defendants named in the complaint conspired to deny equal protection of the law and equal privileges and immunities secured by the Fifth, Thirteenth, and Fourteenth Amendments to the Constitution. To establish a valid claim under § 1985(3), a plaintiff must establish five elements:

> 1) a conspiracy, 2) motivated by racial or other class-based invidious discriminatory animus, 3) for the purpose of depriving, directly or indirectly any person or class of persons of equal protection of the laws, or of equal privileges and immunities under the laws, 4) that the conspirators committed some act in furtherance of the conspiracy, and 5) that the plaintiff was either injured in his person or property or was deprived of having and exercising any right or privilege of a citizen of the United States. *Stevens v. Tillman*, 568 F. Supp. 289, 292 (N.D. Ill. 1983) (citing *Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971)); *see also Trautvetter v. Quick*, 916 F.2d 1140 (7th Cir. 1990).

Defendants Orland, OSD, and OFPD raise several reasons why the plaintiffs cannot establish these requisite elements.

The defendants first contend that they are entitled to summary judgment because the plaintiff cannot establish that they participated in a conspiracy. In a civil case, a conspiracy is defined as "a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties 'to inflict a wrong against or injury upon another,' and 'an overt act that results in damage.' " *Hampton v. Hanrahan*, 600 F.2d 600, 620-21 (7th Cir. 1979) (citing *Rotermund v. United States Steel Corp.*, 474 F.2d 1139 (8th Cir. 1973). Because courts recognize that direct evidence is unlikely to be found, a *claimant* can rely on circumstantial evidence to prove the existence of a conspiracy. "The question of whether an agreement exists should not be taken from the jury in a civil conspiracy case so long as there is a possibility that the jury can infer from the circumstances [that the alleged conspirators] had a 'meeting of the minds' and thus 'reached an understanding' to achieve the conspirator's objectives." *Hampton*, 600 F.2d at 621 (citing *Adickes v. Kress & Co.* 398 U.S. 144, 158-59 (1970)).

Defendants Orland and OFPD assert that no conspiracy existed because the alleged misconduct involves two distinct and separate events which occurred at different times. They suggest that the only misconduct alleged prior to August 31, 1980 involved Westhaven's failure to issue building permits to the developer and the developer's filing of the mandamus lawsuit against Westhaven seeking the issuance of these permits. Because the defendants claim that Westhaven is the only defendant charged with this misconduct, the defendants claim that no conspiracy existed at that point because, by definition,

Westhaven could not conspire with itself. The defendants assert that this action ended with the August 28, 1980 agreed order regarding the building permits in the mandamus lawsuit.

The defendants further allege that the letter writing campaign, a separate and distinct dispute from the mandamus lawsuit, did not begin until October 1980. The defendants contend that this campaign began three months after the end of the mandamus lawsuit and after Creek divested himself of any individual interest in the developments, and two months after the formation of the subsequent partnership which took over the development. Therefore, even if the court found that the letter writing campaign constituted a conspiracy, the defendants conclude that it did not exist at the time Creek owned an individual interest in the developments.

The plaintiff properly counters that parties to a conspiracy are not required to know all the details of the plan or possess the same motives regarding the plan's result. *Hampton*, 600 F.2d at 621. As long as the plaintiff can establish the existence of a single plan, all the alleged conspirators can be held responsible for its consequences. Therefore, even if Westhaven was the only defendant charged with failing to issue the building permits, it does not necessarily mean that no conspiracy could have existed at that time and that the other defendants cannot be held accountable for Westhaven's actions.[2] Furthermore, even if Orland, OFPD, and OSD

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[2] It should be that although the defendants contend that Westhaven is alleged to have acted alone in refusing to issue the necessary building permits and accept the development's

(continued...)

were not members of the alleged conspiracy before October 1980, it does not follow that they cannot be held responsible for the earlier actions of their alleged co-conspirators. It is a well-settled principle in conspiracy law that a conspirator is liable for all overt acts of other conspirators intended to advance the scheme, including "actions which occur before the co-conspirator joins the conspiracy." *United States v. Lynch*, 699 F.2d 839, 842 n.2 (7th Cir. 1982); *see also United States v. Read*, 658 F.2d 1225 (7th Cir. 1981).

However, a final determination of whether a conspiracy existed, when the alleged conspiracy began, and the scope of the alleged conspiracy cannot be resolved here. Based upon the arguments raised by the parties, it is clear that these material factual questions remain in dispute. Most notably, the defendants argue that Westhaven's refusal to issue the building permits and accept the development's final plans, and the letter-writing campaign are separate events. Conversely, the plaintiffs claim that the alleged conspiracy against the construction of their apartment complexes began in 1979 with the refusal to issue the permits and continued through 1982 with the letter-writing campaign. As the Seventh Circuit stated in *Hampton*, "when a plaintiff alleges a conspiracy to violate civil rights, '[t]he existence or nonexistence of a conspiracy is essentially a factual issue that the jury, not the trial judge, should decide.' " 600 F.2d at 621 (citing *Adickes*, 398 U.S. at 176 (Blackmun,

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[2] (...continued)
final plans, the plaintiffs specifically allege that Westhaven and a number of named individuals carried out these actions. See Plaintiffs Second Amended Complaint at ¶ 34.

J., concurring)). Moreover, questions regarding factual issues should be resolved against the moving party. *New Burnham Prairie Homes, Inc. v. Village of Burnham*, 910 F.2d 1475, 1477 (7th Cir. 1990). Therefore, summary judgment is inappropriate on this basis.[3] The defendants also claim that Orland, OFPD, and OSD could not have been members of the alleged conspiracy as a matter of law because by petitioning government representatives they did not commit an illegal act which deprived the plaintiffs of their rights. This court has already addressed this issue in a January 13, 1987 memorandum opinion and order. In that decision, the court recognized that the First Amendment immunizes "petitioning activity" from liability in suits brought under the federal Civil Rights Acts. *Id.*; *see also Eastern Railroad Presidents Council v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

In the January opinion, this court also recognized that Westhaven was not entitled to this protection because a

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[3] The defendants also contend that the plaintiffs did not suffer any damages as required under § 1985(3) because the plaintiffs did not possess an individual interest in the development at the time of the letter-writing campaign. Like their assertion in the conspiracy argument, the defendants claim that Westhaven's denial of the building permits is distinct and separate from the letter-writing campaign and since Orland, OSD, and OFPD did not take action until after the plaintiffs divested themselves of their interest in the development, they could not have suffered any damages. This argument, like the conspiracy argument, fails because the factual question of when the conspiracy began, who was involved in it, and what was its scope remains undetermined. Such factual questions must be left for the trier of fact to determine at trial. *See* Fed.R.Civ. P. 56(c).

municipality was not protected by the First Amendment. Id. at 15. The court noted that the First Amendment is made applicable to the states by the due process clause of the Fourteenth Amendment, *United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967), and that the due process clause only protects "persons," and not states, from being deprived by the state of life, liberty, or property without due process. Because this court found that a municipality is a creature of the state, the court concluded that, unlike natural persons and private corporations, Westhaven could not invoke the protections of the First Amendment. In addition, this court held that the action could not be dismissed against the Westhaven because the plaintiff alleged that the village committed other acts, i.e. refusing to issue the building permits, which were not protected activities. Based upon this court's earlier decision, Orland, like Westhaven, is clearly not entitled to summary judgment. Like Westhaven, Orland is a creature of the state and is not entitled to the protection of its petitioning activity under the First Amendment. Defendant Orland presents no evidence that it should be treated any differently than defendant Westhaven.

The court is persuaded, however, by defendant OFPD's argument that it is entitled to summary judgment on the § 1985(3) claim on this basis. In *Monarch Entertainment Bureau v. New Jersey Highway Authority*, the court held that state agencies are entitled to the protections of the First Amendment. 715 F.Supp. 1290 (D.N.J.), *aff'd*, 893 F.2d 1331 (3d Cir. 1989). While the court acknowledged that quasi-governmental agencies arguably might enjoy greater access to and influence with state departments and offices, it found that they were nevertheless distinct enough entities not to be considered creatures of the

state. *Id.* at 1302. The court determined that "state agencies are, like corporations, organizations that develop their own norms and goals," that agencies' organizational ethics may stray from the legislature's original intent, and that they are "independent bodies with their own mandates and are subject to their own political pressures and interests." *Id.* at 1302-03. Therefore, the court held that the agency at issue in the case was entitled to First Amendment protection for its petitioning activity. *Id.*

This court is persuaded by the *Monarch* court's analysis as it applies to OFPD in this case. Unlike Orland, OFPD cannot be considered a creature of the state. At the time of the alleged petitioning activity, OFPD was merely under private contract with Westhaven to provide fire protection and ambulance service to the village. Westhaven paid OFPD over $25,000 for these services between May 1, 1980 and April 31, 1981. Following the analysis in *Monarch*, the existence of this contractual relationship between Westhaven and OFPD suggests that OFPD is independent enough to be considered more like a private corporation than a state entity. Because OFPD's sole alleged involvement in the purported conspiracy was participation in the letter-writing campaign, and OFPD's right to petition the government through its letters is a constitutionally protected activity, this court finds that as a matter of law, OFPD is entitled to summary judgment on the plaintiffs § 1985(3) claim against it.[4]

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[4] The court notes that plaintiff Creek's response to the defendants' motions for summary judgment focuses upon when the defendants' individual acts to block the housing projects

(continued...)

Defendants contend that the plaintiffs have failed to establish the requisite intent to discriminate on the part of the defendants. The Seventh Circuit has clearly established that a plaintiff must prove "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Askew v. Bloemker*, 548 F.2d 673, 678 (7th Cir. 1976). In *Arlington Heights v. Metropolitan Housing Corp.*, the Supreme Court discussed the proper inquiry into direct and circumstantial evidence to determine whether a discriminatory purpose exists for a defendant's actions. 429 U.S. 252 (1976). The Court noted that consideration of "the impact of the official action—whether it 'bears more heavily on one race than another,' *Washington v. Davis*, [426 U.S. 229, 242 (1976)]—may provide an important starting point. Sometimes a clear pattern unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face." Id.

In this case, there is no clear pattern of discrimination based upon the impact of the defendants' alleged actions. So, the court must consider other available evidence to determine whether the defendants had the requisite intent to discriminate. *Arlington Heights*, 429 U.S. at

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[4] (...continued)
occurred. His response does not address the defendants' claims under the First Amendment. Therefore, this court has relied upon the defendants' arguments and our own research. In addition, whether OSD is entitled to the same treatment as OFPD cannot be determined at this juncture because OSD has failed to provide this court with any evidence demonstrating sufficient independence from the state which would warrant protection of its petitioning activity under the First Amendment.

266. The court must consider such factors as: 1) the historical background of the defendants' actions, 2) the sequence of events leading up to the challenged actions, 3) the existence of any departures from the normal procedural sequence, and 4) the legislative or administrative history of the decision to take action including contemporary statements by members of the decision making body, minutes of the meetings, and reports. *Id.* at 267-68.

The defendants provide evidence purportedly demonstrating that race or class-based discrimination was not a factor in their opposition to the building of the plaintiffs apartment complexes. Defendants claim that based on information provided by the Board of Trustees of OFPD, they believed that the complexes could pose a fire hazard. Defendants also contend that their opposition was based on a moratorium on the building of all multi-family units from 1977 to 1982 imposed by Orland. Orland also claims to have expressed opposition to the plaintiffs building project before plaintiff s application for government financing or subsidies and before Orland's notification that the complexes would be subsidized by the federal government. Furthermore, the defendants assert that the minutes of the village meetings and letters written by trustees demonstrate that no statements could be directly or indirectly attributed to racial considerations.

While this evidence is clearly sufficient to raise the possibility that the defendants lacked the requisite intent to discriminate, the evidence provided is not dispositive of the issue. Evidence presented by the plaintiff in this case, such as Westhaven's delay in the issuance of building permits following its notification that the plaintiffs had applied for HUD subsidies and IHDA loans, ade-

quately contradicts the defendants' evidence. Indeed, before being informed of the plaintiffs' application for state and federal funding, the plaintiffs' evidence suggests that defendant Westhaven appeared to support the building of the complexes.

The Seventh Circuit has stated that questions of motivation or intent are particularly inappropriate for summary judgment. *Staren*, 529 F.2d at 1261; *Conrad v. Delta Air Lines, inc.*, 494 F.2d 914, 918 (7th Cir. 1974). Based upon the plaintiffs anticipated evidence contradicting the defendants' claimed lack of discriminatory intent, the plaintiffs have met their burden of establishing facts demonstrating that the question of the defendants' intent remains in dispute. Therefore, summary judgment is not appropriate.

Turning to the question of discriminatory impact, the defendants also argue that their petitioning campaign did not have any impact, let alone a discriminatory impact, on the plaintiff's receipt of IHDA loans and HUD subsidies. The defendants suggest, for example, that building low-income housing in their area does not necessarily translate into building minority housing. The defendants present statistics purportedly showing the number of white area residents who would qualify to live in the plaintiff's apartment complexes. This argument, however, does not address the fact that the majority of persons eligible for Chicago Housing Authority units in federally funded housing complexes are minorities. Moreover, the impact of these statistics also depends upon the trier of fact's determination of whether the statistics are credible. Thus, the presentation of this evidence does not alter the court's determination that summary judgment is not appropriate at this time.

The defendants also suggest that there was no discriminatory impact because IHDA representatives testified that they based their decision not to give the plaintiff loans on the economic infeasibility of the project and HUD eventually did give the plaintiff the requested subsidies. This court has already addressed a similar argument raised by the defendants in a July 1988 memorandum opinion and order. The defendants argued in July 1988 that the plaintiffs had failed to establish that an unconstitutional purpose was a motivating or substantial factor in prompting the action that deprived the plaintiffs of their constitutional rights. However, this court held that the plaintiffs had provided sufficient evidence to at least create a question of material fact as to this issue.

At that time, the defendants also contended that the decision not to give the plaintiffs IHDA funding "would have resulted even had the [alleged] impermissible purpose not been considered." *Id.* at 287. The defendants claimed that the prevailing market conditions and the economic infeasibility of the development plan would have caused the delays and loss of IHDA funds notwithstanding their alleged unconstitutional activity. However, this court determined in the July 1988 order that the defendants' argument did not provide an appropriate basis for summary judgment because the question of whether an event would have occurred notwithstanding a defendant's alleged conduct typically raises an issue of disputed fact. *See Cohen v. Cook County, Illinois*, 677 F.Supp. 547, 550-51 (N.D. Ill. 1988).

Moreover, in the July 1988 opinion, this court conducted a thorough review of the evidence presented by the parties which related to the possible impact of the defen-

dants' actions. The court found that summary judgment on this issue was unwarranted because the plaintiffs had presented sufficient evidence to create a material issue of fact as to whether they would have failed to obtain financing notwithstanding the defendants' alleged unconstitutional conduct. The defendants have not presented any legal support or conclusive evidence which alters the court's earlier determination that a material question of fact remains regarding the alleged impact of the defendants' actions.[5] Summary judgment is not warranted on this basis either.

Finally, the defendants maintain that they are entitled to summary judgment because the plaintiffs did not sustain any recoverable damages. The defendants reason that since the plaintiffs syndicated their investment in the two apartment complexes on or about March 7, 1983, plaintiffs still earned money on their original investment and there are no recoverable damages. Defendants cite *Excalibur Oil. Inc. v. Sullivan*, 659 F.Supp. 1539, 1549 (N.D. Ill. 1987), in support of their position.

In *Excalibur Oil, Inc.*, the plaintiff brought suit against the defendant for making misrepresentations in violation of federal and state securities laws and common law claims in connection with the sale of securities to the plaintiff. The court determined that summary judgment

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[5] The defendants also suggest that their actions had no impact on the plaintiffs' receipt of federal grants because the plaintiffs received subsidies from HUD. However, the plaintiffs' receipt of HUD subsidies does not necessarily mean that their receipt of the subsidies were not delayed or smaller than they would have been had the defendants not opposed the building of the apartment complexes. This issue also must be resolved at trial.

on the case was warranted because the parties agreed that the plaintiff did not suffer any damages due to the defendant's alleged actions. The court based this determination on the testimony of the plaintiff's president which amply demonstrated that his company did not suffer any damages. *Id.* at 1549-50.

Contrary to the defendants' assertion, the case before this court is not analogous to *Excalibur Oil, Inc.* The plaintiffs here clearly refute the defendants' assertion that they did not suffer damages due to the defendants' actions. Furthermore, the plaintiffs do not present as limited a claim for damages as did the plaintiffs in *Excalibur Oil, Inc.* The plaintiffs allege that they incurred damages in the form of extension fees, increased interest rates, attorney's fees, architectural and engineering expenses, lost profits, and increased costs of development from 1979 to on or about April 1983. Plaintiff's Second Amended Complaint, Count III, at ¶ 39. In addition, the impact of these statistics regarding damages depends upon the trier of fact's determination of their credibility. Thus, summary judgment is not appropriate on this basis.

B. *The Tortious Interference Claim*[6]

Under Illinois law, to establish a valid claim for tortious interference with prospective business relations, a

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[6] Because the plaintiffs federal claim remains, their claim for tortious interference with prospective business relations remains under the doctrine of pendant jurisdiction. *United Mine Workers of America v. Gibb*, 383 U.S. 715, 727 (1966); *Price v. Pierce*, 823 F.2d 1114, 1119 (7th Cir. 1987), *cert. denied*, 108 S.Ct. 1222 (1988).

plaintiff must establish four substantive elements: 1) that the plaintiff reasonably expected to enter into a valid business relationship, 2) that the defendant knows of the plaintiffs expectations, 3) that the defendant intentionally interferes, thus preventing the plaintiffs expectations from ripening into a business relationship, and 4) that the plaintiff suffers damages from the defendant's interference. *Kemmerer v. John D. & Catherine R. MacArthur Foundation*, 594 F. Supp. 121, 122 (N.D. Ill. 1984); *Fishman v. Estate of Wirtz*, 807 F.2d 520, 545 (7th Cir. 1986).

In this case, the defendants raise several arguments in opposition to the plaintiffs' claim for tortious interference which are strongly reminiscent of their arguments against the plaintiffs' § 1985(3) claim. For example, the defendants stress that the plaintiff could not have had a reasonable expectation of obtaining the IHDA loans and that they did not interfere with this expectation because the plaintiffs had no good reason to think that they would receive the loans. The defendants reiterate their contention that the IHDA loans were denied due to the alleged economic infeasibility of the development. The defendants also stress that to have induced IHDA to deny the plaintiffs' loan application, the defendants would have had to actively persuaded IHDA rather than passively providing IHDA with information as they contend they did.

As the court already determined with reference to the § 1985(3) claim, summary judgment on this issue was not warranted because the factual issues raised by the defendants remain in dispute. The plaintiffs have provided sufficient evidence to rebut the defendants' claimed basis for IHDA's denial of the plaintiffs' request for fund-

ing. Similarly, sufficient evidence exists to leave the factual question of the defendants' intent in dispute. Therefore, this court denies the defendants' motion for summary judgment on the tortious interference claim.[7]

Conclusion

For the reasons stated above, the court grants Shell's motion to rename the plaintiff intervenor and amend the complaint. Plaintiff should file the amended complaint within ten (10) days of the date of this order. The court denies defendants Orland and OSD's motion for summary judgment on the § 1985(3) and grants defendant OFPD's motion for summary judgment on that claim. The court also denies defendants Orland, OSD, and OFPD's motion for summary judgment on the tortious interference claims.

E N T E R

Ann Claire Williams, Judge
United States District Court

Dated: Apr 10 1992

[7] The court notes that defendant OFPD has not brought a motion to dismiss the plaintiffs tortious interference claim against it. This matter should be addressed at the status hearing.

App. 57

[Dated July 30, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

J. FRED CREEK, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 83 C 1851
	)	
	)	
VILLAGE OF WESTHAVEN, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff J. Fred Creek ("Creek") brought this lawsuit against defendants Village of Westhaven ("Westhaven"), *et al.*, pursuant to 42 U.S.C. §§ 1981-1986, 3601, and various state laws. Plaintiff, who is a housing developer, seek damages from defendants for allegedly delaying construction of plaintiff's housing projects.

On April 10, 1992, this court issued an opinion on defendants' motion for summary judgment on certain claims in plaintiff s complaint pursuant to Federal Rule of Civil Procedure 56 ("Rule 56"). In this opinion, this court determined that defendant Orland Fire Protection District ("OFPD") was entitled to judgment on plaintiffs § 1985 claim. Summary judgment was denied on the 1985 claim with respect to defendants Orland Park ("Orland") and Orland School District No. 135 ("OSD") and on the tortious interference claim with respect to Orland, OFPD, and OSD.

This case is currently before the court on plaintiff's motion to reconsider the court's ruling on defendants' motion for summary judgment, OSD's motion for summary judgment on plaintiff's § 1985 claim, and Orland and OFPD's motion for summary judgment on Count V. For the reasons stated below, plaintiff s motion to reconsider is denied, OSD's motion for summary judgment is denied, and Orland and OFPD's motion for summary judgment is denied.

Background

To clarify the relationships between the parties, a brief explanation of the chain of ownership of the developments at issue in this case is required. In approximately 1975, the predecessor-in-interest to plaintiff began developing plans for apartment complexes. Creek purchased the development on January 1, 1980. On July 1, 1980, Creek conveyed his interest in the developments to the Pheasant Ridge Venture ("PRV"). PRV then created a partnership ("the Shell/PRV partnership") with Shell Development Corporation ("Shell") on August 31, 1980 to acquire financing for, syndicate interests in, and complete the developments. PRV and Shell executed partnership agreements with Crane General. Inc. ("Crane") on August 31, 1982 named Pheasant Ridge Associates ("PRA") and Hunter Apartment Associates ("HAA") in anticipation of construction of the developments. On March 7, 1983, revised partnership agreements were executed for both partnerships, granting partnership interests to Capital Housing Partners CL ("Capital"), the entity that syndicated interests in the developments. Pursuant to these revised agreements, PRA and HAA currently own and operate the developments.

The developments at issue in this case, the Pheasant Ridge and Hunter Apartments, are located on land that previously had been an unincorporated area zoned by Cook County, Illinois. In 1975, the predecessor-in-interest to plaintiff sought to have the property annexed and zoned by Westhaven in order to develop the property for multi-family residences. Westhaven was a municipality located in Cook County which was 98% white and had no black residents. After many meetings and public hearings, the Board of Trustees of Westhaven accepted the plans for annexation and zoning, and, shortly thereafter, the final plans for the housing developments.

In January 1979, The Department of Housing and Urban Development ("HUD") notified Westhaven that the developers had applied for rental subsidies, insurance, and mortgage financing for the apartment complexes. Under laws governing such financing, the developers would be required to comply with federal fair housing laws and an affirmative action marketing plan. The use of the requested rental subsidies would also require the developers to make units available to a certain number of persons eligible for Chicago Housing Authority housing. Most of the eligible persons are black. As a result of these requirements, the housing developments would be racially integrated.

Plaintiff had also applied for mortgage financing and a construction loan from the Illinois Housing Development Authority ("IHDA"). This application, and subsequent amendments to it, remained pending before the IHDA during the time that plaintiff applied for and received HUD funding. IHDA eventually denied plaintiffs application for funding and plaintiff was forced to depend solely upon the HUD financing they had received.

Following notification of the developers' intent to use HUD and IHDA financing, plaintiff claims that Westhaven, its board of trustees, and various other related organizations, such as defendants Orland, OFPD, and OSD began a campaign to prevent construction of the Pheasant Ridge and Hunter Apartments so long as the possibility existed that subsidized and black tenants would occupy some of the units.

In August 1979, when Westhaven refused to issue the building permits necessary for construction of the apartment complexes, the developers filed suit in the Circuit Court of Cook County seeking a writ of mandamus requiring Westhaven to approve the final plans and issue the requisite permits. On April 14, 1980, the state court entered a Final Judgment Order in favor of the developers, declaring that the developers were entitled to use the property as planned and to the building permits, and that Westhaven and its agents could not interfere with the developments' construction.

When Westhaven continued to delay issue the permits, the developers brought a contempt proceeding against Westhaven which resulted in an August 28, 1980 agreed order requiring Westhaven to deposit the permits with the court. The court was to release the permits to plaintiff after the parties complied with certain conditions set forth in the order. Because Westhaven still continued to delay issuing of the permits, the state court, pursuant to a motion to enforce the agreed order, entered an order requiring Westhaven to deposit the permits by May 11, 1982. On May 17, 1982, the court entered an order stating that the order itself constituted the necessary building permits because Westhaven had still failed to deposit

them with the court. On November 23, 1982, Westhaven finally deposited the permits with the court.

During this time period, many of the other defendants in this lawsuit, including Orland, OFPD, and OSD, began a letter-writing campaign to oppose construction of the development. For example, from October 1980 to February 1982, OSD met to coordinate its opposition and wrote letters against the developments to such agencies as the IHDA and individuals such as Representative Edward Derwinski. Similarly, OFPD wrote a letter on October 16, 1980 to IHDA opposing the building of the apartment complexes because it claimed they would constitute fire hazards. From October 1980 through February 1982, Orland also sent letters to IHDA, HUD, former Senator Charles Percy, and others opposing the construction of the apartment complexes for a variety of reasons.

Among other claims, plaintiff alleges that the letter-writing campaign and Westhaven's continuous and improper denial of the building permits constitute acts in furtherance of a conspiracy to prevent the construction of the Pheasant Ridge and Hunter Apartments. Plaintiff claims that defendants intended to exclude low-income and minority tenants from residing in Westhaven and near Orland, and to exclude children of such tenants from attending OSD. Pursuant to 42 U.S.C. § 1985, plaintiff alleges that this conspiracy constituted an attempt to deny equal protection of the laws and equal privileges and immunities secured by the Fifth, Thirteenth, and Fourteenth Amendments to the Constitution. Plaintiff also alleges that attempts to prevent the financing of the project constituted a tort' IOUs interference with prospective economic advantage.

Plaintiff's Motion for Reconsideration

Motions for reconsideration are not a matter of routine practice in this jurisdiction. *Settino v. City of Chicago*, 642 F.Supp. 755, 759 (N.D. Ill. 1986). Despite their generally restricted role, such motions are appropriate when, for example, "applicable law or the known facts have changed since an issue was submitted to the court." *National Union Fire Insurance Co. of Pittsburgh v. Continental Illinois Corp.*, 116 F.R.D. 252, 253 (N.D. Ill. 1987). Motions for reconsideration are generally not appropriate, however, to introduce new legal theories or new evidence which could have been adduced during the pendency of the prior motion. *Keene Corp. v. International Fidelity Insurance Co.*, 561 F.Supp. 656, 665 (N.D. Ill.), *aff'd*, 736 F.2d 388 (7th Cir. 1982). Moreover, they are not appropriate when the moving party simply advances arguments which the court has already rejected. *Fisher v. Samuels*, 691 F.Supp. 63, 74 (N.D. Ill. 1988).

Plaintiff argues that reconsideration of defendants' summary judgment motion is appropriate because plaintiff never briefed the "First Amendment issue" which formed the basis of this court's determination that OFPD was entitled to judgment on plaintiffs § 1985 claim. According to plaintiff, it had been agreed that the parties' briefs would be limited to the "timing issue." Since plaintiff allegedly did not have the opportunity to respond to defendants' First Amendment defense, plaintiff argues that in conjunction with OSD's current motion for summary judgment on the § 1985 claim, this court should reconsider its previous determination that summary judgment was appropriate on this basis.

This court is not persuaded that it was inappropriate for defendants to raise their First Amendment argument

during briefing on their motion for summary judgment. In their motions, defendants argued that summary judgment was appropriate because Orland's, OFPD'S, and OSD's actions took place after plaintiff divested himself of their rights and interests in the development of the apartment complexes. Plaintiff countered that Orland, OFPD and OSD could be held accountable for Westhaven's actions, which occurred while plaintiff still had a viable interest in the developments, because they had conspired with Westhaven to prevent plaintiff from building the apartment complexes. It was in response to plaintiff's argument that there was a conspiracy between all of the defendants that Orland, OFPD, and OSD argued that their petitioning activity could not be considered an illegal act which deprived plaintiff of his rights, as needed to find the requisite conspiracy under § 1985, because their petitioning activity was protected by the First Amendment. This argument was an appropriate response to plaintiff's conspiracy argument.

Moreover, plaintiff has provided this court with no reason why they could not have responded to defendants' First Amendment argument. While defendants may have only raised this argument in their reply brief, plaintiff has offered this court no reason why they could not and did not seek to file a surreply in order to respond to this argument.

Even if the circumstances warranted reconsideration of this court's ruling, this court is still not persuaded that OFPD is not entitled to summary judgment on plaintiffs § 1985 claim based on its First Amendment claim. As this court explained in its April 10, 1992 opinion on defendants' motion for summary judgment, the First Amendment immunizes "petitioning activity" from lia-

bility in suits brought under the federal Civil Rights Acts. *New Burnham Prairie Homes, Inc. v. Village of Burnham*, 910 F.2d 1475, 1477 (7th Cir. 1990); *see also United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern Railroad Presidents Council v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). However, this protection is only afforded to "persons," and not states, because the due process clause of the Fourteenth Amendment, which makes the First Amendment applicable to the states, only protects "persons."

In *Monarch Entertainment Bureau v. New Jersey Highway Authority*, 715 F.Supp. 1290 (D.N.J.), *aff'd*, 893 F.2d 1331 (3d Cir. 1989), the court held that state agencies are also entitled to the protections provided by the First Amendment. While the court recognized that quasi-governmental agencies arguably might enjoy greater access to and influence with state departments and offices, it found that they were nevertheless distinct enough entities not to be considered creatures of the state. *Id.* at 1302. The court determined that "state agencies are, like corporations, organizations that develop their own norms and goals," that agencies' organizational ethics may stray from the legislature's original intent, and that they are "independent bodies with their own mandates and are subject to their own political pressures and interests." *Id.* at 1302-03. Therefore, the court held that the agency at issue in that case was entitled to First Amendment protection for its petitioning activity. *Id.*

Relying on the *Monarch* court's analysis, this court determined that OFPD was sufficiently independent not to be considered a "creature of the state" and to be entitled to the protections of the First Amendment. As this court explained in its April 10, 1992 opinion: "At the

time of the alleged petitioning activity, OFPD was merely under private contract with Westhaven to provide fire protection and ambulance service to the village. Westhaven paid OFPD over $25,000 for these services between May 1, 1980 and April 31, 1981. Following the analysis in *Monarch*, the existence of this contractual relationship between Westhaven. and OFPD suggests that OFPD is independent enough to be considered more like a private corporation than a state entity."[1]

Plaintiff argues that OFPD should be considered a creature of the state because it derives its existence and all of its powers from the legislature. According to plaintiff, OFPD's contract with Westhaven does not transform it into a private corporation.

This court disagrees. The fact that OFPD derives its existence from the state does not necessarily make OFPD a creature of the state as plaintiff suggests. Plaintiff has presented no evidence which suggests that OFPD is not an independent body with its own "norms and goals." *See Monarch*, 715 F. Supp. at 1302-03. And, contrary to plaintiff's contention, defendants have presented evidence of OFPD's contract with Westhaven to provide fire protection and ambulance service to the village.[2] The existence of a contractual relationship between Westhaven and OFPD suggests that OFPD is independent enough not to be considered a state entity. Given this contract and the lack of evidence demonstrating that OFPD acts as the alter ego of the state, this court finds

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[1] *Creek v. Westhaven*, 83 C 1851 (N.D. Ill. April 10, 1992) at 18.

[2] *See* Defendant Orland Park Fire Protection District's Motion for Summary Judgment, Exhibit E.

that OFPD's petitioning activity is protected by the First Amendment. Therefore, plaintiff's motion for reconsideration of this court's ruling that OFPD is entitled to judgment on plaintiff's § 1985 claim is denied.[3]

The Motions for Summary Judgment

A motion for summary judgment should be granted when the pleadings and discovery show that there is no

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[3] In response to plaintiffs' request for reconsideration, Orland argues that this court should also reconsider its determination that Orland's petitioning activity is not protected by the First Amendment. In an opinion issued on January 13, 1987, this court determined that Westhaven was not entitled to judgment on plaintiffs' § 1985 claim because municipalities are not entitled to the protections of the First Amendment. This determination was based on the court's conclusion that the due process clause of the Fourteenth Amendment, which makes the First Amendment applicable to the states, does not protect government from arbitrary actions by the sovereign. *See Creek v. Westhaven*, 83 C 1851 (N.D. Ill. Jan. 13, 1987). In this court's April 10, 1992 opinion, this court applied this reasoning to Orland because, like Westhaven, it is a municipality and no evidence was presented which suggested that Orland should be treated differently than Westhaven.

Orland now seeks to reargue this court's 1987 determination that municipalities' petitioning activities are not protected by the First Amendment and this court's 1992 determination that Orland's petitioning activity is not protected by the First Amendment. However, Orland fails to provide this court with a sufficient reason why it should be permitted to reraise this legal issue approximately five years later. Orland does not present any new legal authority which indicates that there has been a change in the law nor any evidence which indicates that Orland should be treated differently than other municipalities. Therefore, this court will not reconsider its determination that Orland is not entitled to judgment on plaintiffs' § 1985 claim on this basis.

genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. The moving party bears the initial burden of establishing that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 321-22 (1986). The nonmoving party must respond to the moving party's claims by establishing specific facts that demonstrate a genuine issue that must be resolved at trial. *Id.* When assessing the validity of a summary judgment motion, the court must view all evidence in the light most favorable to the nonmoving party and draw all inferences in the nonmoving party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

A. *OSD's Motion for Summary Judgment on Plaintiff's § 1985 Claim*

Plaintiff alleges in his complaint that, pursuant to § 1985(3), OSD, in conjunction with Westhaven, Orland, and other defendants named in the complaint conspired to deny equal protection of the law and equal privileges and immunities secured, by the Fifth, Thirteenth, and Fourteenth Amendments to the Constitution. To establish a valid § 1985 claim, plaintiff must establish five elements:

> (1) a conspiracy, (2) motivated by racial or other class-based invidious discriminatory animus, (3) for the purpose of depriving, directly or indirectly, any person or class of persons of equal protection of the laws, or of equal privileges and immunities under the laws, (4) that the conspirators committed some act in furtherance of the conspiracy, and (5) that the plaintiff was either injured in his person or property or was deprived of having and exercising any right or privilege of a citizen of the United States.

Stevens v. Tillman, 568 F. Supp. 289, 292 (N.D. Ill. 1983) (citing *Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971)); *see also Trautvetter v. Quick*, 916 F.2d 1140 (7th Cir. 1990).

OSD argues that it is entitled to judgment on plaintiff's § 1985 claim because by petitioning government representatives, it did not commit an illegal act which deprived plaintiff of his rights. OSD argues that like OFPD, its petitioning activity is protected by the First Amendment because, under the analysis of *Monarch*, it should not be considered a state actor. Plaintiff counters that OSD should be considered a state entity because OSD derives its existence and power from the state. Plaintiff attacks the appropriateness of relying upon the *Monarch* court's analysis and argue that even applying *Monarch*, OSD should still be considered a state entity.

This court has already determined that it is appropriate to apply the *Monarch* court's analysis. Therefore, the remaining question is whether under *Monarch*, OSD should be considered a government entity or an independent actor. After reviewing the evidence presented by the parties, this court is persuaded that OSD should be considered an independent actor entitled to the protections afforded by the First Amendment.

OSD has presented ample evidence which demonstrates its independence from the state. For example, OSD can issue bonds; make and enforce contracts; sue or be sued in its own name; acquire, construct, maintain, repair and operate projects; hire employees and agents; lease real property, charge and collect fees, and create and enforce rules and regulations governing its projects. These examples indicate that OSD is a distinct enough entity not to be considered a creature of the state. While

OSD may have been created by the state, it clearly has the independence and power to develop its own norms and goals, and is subject to political pressures and interests which may be distinct from those of the state. *See Monarch*, 715 F.Supp. at 1302-03. Therefore, this court finds that OSD is entitled to the protections afforded under the First Amendment.

However, OSD is not entitled to judgment on plaintiff's § 1985 claim because there is still a material question of fact which must be resolved relating to OSD's First Amendment defense. In 1975, OSD signed a contract with plaintiff which provided for the following:

> 1. Owner shall . . . pay as a cash donation to the School District the following amounts . . . $44.57 per dwelling unit. . . .
>
> 2. School District shall do the following: Shall take no action, legal or otherwise, to oppose or attempt to cause any others to oppose, the granting of the zoning which has been proposed and presented by Owner to the School District . . . The School District will not take any action, legal or otherwise, to oppose, or to attempt to cause others to oppose, the proposed development which has been presented to the School District.

Exhibit A at 2-3. Pursuant to this contract, plaintiff argues that OSD knowingly waived its right to petition against plaintiff s housing development and therefore, cannot rely on the First Amendment to protect its petitioning activity.

OSD counters that this contract cannot be relied upon because the circumstances surrounding the building of plaintiff's apartment complexes changed substantially from the time that OSD signed the contract and when it

began its letter-writing campaign. OSD further contests whether it knowingly and intentionally relinquished its First Amendment rights when it signed the contract with plaintiff. This dispute clearly raises a material question of fact which cannot be resolved on a motion for summary judgment. Therefore, OSD's motion for summary judgment on plaintiff's § 1985 claim is denied.[4]

B. *Orland and OFPD's Motion for Summary Judgment on Count V*

Orland and OFPD argue that they are entitled to summary judgment on plaintiffs tortious interference with prospective business relations claim as alleged in Count V because their petitioning activity is protected by the United States and Illinois Constitutions.[5]

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[4] OSD also argues that it is entitled to judgment on plaintiff's § 1985 claim because plaintiff did not have an interest in the housing developments in 1980 when OSD began petitioning against them. However, as explained in this court's April 10, 1992 opinion, OSD could still be held accountable for Westhaven's actions before 1980. It is a well-settled principle in conspiracy law that a conspirator is liable for all overt acts of other conspirators intended to advance the scheme, including "actions which occur before the co-conspirator joins the conspiracy." *United States v. Lynch*, 699 F.2d 839, 842 n.2 (7th Cir. 1982).

[5] To establish a valid claim for tortious interference with prospective business relations, a plaintiff must establish four substantive elements: (1) that the plaintiff reasonably expected to enter into a valid business relationship, (2) that the defendant knew of the plaintiff s expectations, (3) that the defendant intentionally interfered, thus preventing the plaintiffs expectations from ripening into a business relationship, and (4) that the plaintiff suffered damages from the defendant's interfer-

(continued...)

With respect to OFPD, this court has already determined that its petitioning activity is protected by the First Amendment. Since Article 1, Section 5 of the Illinois Constitution provides for virtually identical rights, this court also finds that OFPD's petitioning activity is protected by the Illinois Constitution.[6] Therefore, under *Arlington Heights National Bank v. Arlington Heights Federal Savings & Loan Ass'n*, 229 N.E.2d 514 (Ill. 1967), OFPD's petitioning activity generally would not provide a permissible basis for the filing of a civil claim.

However, the Illinois Supreme Court has firmly established that where the conduct of a defendant in an interference with contract action is privileged, the plaintiff is still entitled to judgment if he or she can prove that defendant's conduct was unjustified or malicious. *HPI Health Care v. Mount Vernon Hospital*, 545 N.E.2d 672, 677 (Ill. 1989); *see also Swager v. Couri*, 395 N.E.2d 921 (Ill. 1979); *Arlington Heights National Bank*, 229 N.E.2d 514.[7] Whether OFPD's conduct was unjustified or malicious raises a material question of fact-which is strongly disputed. Since this factual question cannot be resolved

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[5] (...continued)
ence. *Kemmerer v. John D. & Catherine R. MacArthur Foundation*, 594 F. Supp. 121, 122 (N.D. Ill. 1984); *Fishman v. Estate of Wirtz*, 807 F.2d 520, 545 (7th Cir. 1986).

[6] Article 1, Section 5 of the Illinois Constitution provides:

> The people have the right to assemble in a peaceable manner, to consult for the common good, to make known their opinions to their representatives and to apply for redress of grievances.

[7] In interference with contract cases, the term "malicious" means that the interference must have been intentional and without justification. *HPI Health Care*, 545 N.E.2d at 677.

on a Rule 56 motion, OFPD's motion for summary judgment on Count V is denied.

With respect to Orland, this court has already determined that its petitioning activity is not protected by the First Amendment. Orland claims that it is still entitled to judgment on Count V because its petitioning activity is protected by the Illinois Constitution. According to Orland, the Illinois Constitution provides a broader range of protection which, unlike the United States Constitution, encompasses municipalities.

However, where an Illinois constitutional provision is parallel to an United States constitutional provision, courts may not construe protections granted by the Illinois Constitution more broadly than those afforded by the United States Constitution. *People v. Tisler*, 469 N.E. 2d 147, 156 (Ill. 1984); *see Jones v. Harris*, 1989 U.S. Dist. Lexis 2584 (N.D. Ill. 1989); *but see People v. McCauley*, 595 N.E.2d 583 (Ill.App. 1992). Under this doctrine known as the lock step doctrine, Orland's petitioning activity cannot be protected by the Illinois Constitution because it is not protected by the United States Constitution. Therefore, Orland,is not entitled to summary judgment on Count V on this basis.[8]

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[8] Even if Orland's petitioning activity was protected by the Illinois Constitution, it still would not be entitled to summary judgment on Count V. As explained with respect to OFPD, where the conduct of a defendant in an interference with contract action is privileged, the plaintiff is still entitled to judgment if he or she can prove that defendant's conduct was unjustified or malicious. *HPI Health Care*, 545 N.E.2d at 677. Whether Orland's conduct was unjustified or malicious raises a material question of fact which cannot be resolved on a Rule 56 motion for summary judgment.

Conclusion

For the reasons stated above, plaintiff's motion to reconsider the court's ruling on defendants' motion for summary judgment is denied, OSD's motion for summary judgment on plaintiff's § 1985 claim is denied, and Orland and OFPD's motion for summary judgment on Count V is denied.

ENTER:

Ann Claire Williams, Judge
United States District Court

Dated: July 30, 1993

[Dated December 21, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

J. FRED CREEK,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 83 C 1851
	)	
	)	
VILLAGE OF WESTHAVEN, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Ten years ago, plaintiff J. Fred Creek ("Creek"), a housing developer, brought this action against defendants Village of Westhaven ("Westhaven"), Village of Orland Park ("Orland Park"), Orland Fire Protection District ("OFPD"), Orland Park School District No. 135 ("OSD"), et al., alleging that defendants illegally delayed and conspired to block the construction of plaintiff's mixed income housing projects in violation of 42 U.S.C. §§ 1981-1986, 3601, the Fifth, Thirteenth, and Fourteenth Amendments to the United States Constitution, and various pendent state law claims. (Second Amended Complaint). This suit is for individual damages that Creek suffered as a result of the delay. Following a long and torturous history, this case finally appears ready for trial. In preparation for trial, the parties have filed numerous motions in limine. On December 3, 1993, the court addressed four of the parties' motions. In this opinion, the court will address the three remaining fully briefed motions:

1) Defendant Westhaven's Motion to Preclude Plaintiff from Presenting Any Evidence and Making any Claim at Trial for Money Damages;

2) Plaintiff's Motion Regarding Previously Litigated Issues;

3) Plaintiff's Motion to Limit Defendant's Peremptory Challenges.

For the reasons stated below, the court rules as follows: Westhaven's Motion to Preclude Evidence and Claims for Damages is granted in part and denied in part; Plaintiff's Motion Regarding Previously Litigated Issues is granted in part and denied in part; and Plaintiff's Motion to Limit Defendant's Peremptory Challenges is granted in part and denied in part.

Background

The developments at issue in this case, the Pheasant Ridge Apartments and Hunter Apartments, are located on two parcels of land currently located in the Village of Westhaven, Illinois. Prior to January 1976, both parcels were part of an unincorporated portion of southwestern Cook County. In 1975, Creek's predecessor-in-interest, Terracom Development Group, Inc. ("Terracom"), the owner of the parcels, sought to have the unincorporated land annexed to Westhaven and then zoned to allow for the development of multi-family residences.[1] At the time, Creek was a Vice-President at Terracom, and the principal partner in charge of the proposed Pheasant Run and Hunter Apartments project. (Pl. Response Brief at 4).

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[1] Once a party to this litigation, Terracom was dismissed for want of prosecution on October 4, 1992.

Following numerous meetings and public hearings, the Board of Trustees of Westhaven accepted the plans for annexation and zoning, and shortly thereafter, Terracom's plans for the housing development.

In January 1979, the Department of Housing and Urban Development ("HUD") notified Westhaven that the developer had applied for Section 8 rental subsidies, insurance, and mortgage financing for the proposed development. Under laws governing the requested financing, the developer is required to comply with all Federal Fair Housing laws and to develop an affirmative action marketing plan for the project. Use of the requested rental subsidies further requires the developer to set aside a certain number of units for individuals eligible for public housing with the Chicago Housing Authority.[2] Since most of these individuals were black, Terracom's plan to rely on Section 8 financing meant that its development would be racially integrated. At the time, Westhaven was 98% white and had no black residents.

Following notification of the developer's plan to use Section 8 financing, Westhaven and the Members of its Board of Trustees allegedly initiated a campaign to block construction of the Hunter and Pheasant Ridge Apartments, at least as long as the possibility existed that the development would be racially integrated. According to Creek, Westhaven's failure to grant its final approval to the project and its refusal to issue the required building

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[2] Under the Section 8 program, owners of private buildings lease apartments to low income residents, who pay the owners approximately 25 percent of their income as rent. The federal government then pays the owners the remainder of the tenants' rent.

permits in 1979 were motivated by racially based opposition to the proposed development. Though Creek alleges that many of the other defendants in the suit, including Orland Park, OSD, and OFPD, later joined with Westhaven and its Board of Trustees in opposition to the development, the initial efforts to block the project were apparently directed by Westhaven alone. (Plaintiff s Response Brief at 8).

In August 1979, Terracom and LaSalle National Bank[3] filed suit in the Circuit Court of Cook County, Illinois—*LaSalle Nat'l Bank, et al. v. Village of Westhaven*, No. 79 L 19122. In paragraph 10 of the state court complaint, Terracom alleged that "by reason of the financing through the Department of Housing and Urban Development and the presence of subsidized tenants in some of the units the Village refused to approve said plans". The suit sought an order of mandamus requiring Westhaven to approve the Final Plans for the Pheasant Ridge and Hunter Apartments, and to issue building permits for the apartments. The suit also sought a declaratory judgment that the Property could be used as planned.

While the state court proceeding was pending, Creek's individual ownership interest in the proposed developments changed dramatically. Prior to the filing of the suit, Creek's interest in the project was limited to his share of profits as a general partner of Terracom. On January 1, 1980, approximately three weeks before the state trial began, Creek's partners at Terracom assigned

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[3] Though Terracom was the beneficial owner and developer of the property, legal title belonged to LaSalle National Bank as Trustee under Trust No. 49666. (August 29, 1979 State Court Complaint at 1).

him all rights, title, and interest in the Hunter and Pheasant Ridge Apartments in exchange for all of his interest in Terracom's other projects. (January 1, 1980 Exchange Agreement, Pl. Ex. B). They also assigned Creek an option to purchase the land on which the projects were to be built. (Pl. Response Brief at 4). Consistent with his role as Terracom's successor-in-interest and his former role as Terracom's principal partner in charge of the proposed developments, Creek was an active participant at trial, and was the only Terracom principal to testify. (Reply Brief at 2-4).

On April 14, 1980, the state court entered a Final Judgment in favor of plaintiffs. The court held that plaintiffs and "all persons claiming by though and under them" were entitled to use the property as planned. (April 14, 1980 Order at 4). The court further held that Westhaven had a duty to issue the required building permits upon presentation of a loan commitment and the required fees. Finally, the court enjoined Westhaven, "its officers, servants and employees" from interfering with the construction of the apartment development. (*Id.* at 5). Exactly one month later, Creek exercised his option to buy the land on which his projects were to be built.[4]

Despite the April 14, 1980 Order, Westhaven continued to resist Creek's requests for the required building permits. On June 25, 1980, Creek brought a contempt proceeding against Westhaven. (Creek's Second Amended Complaint at 10). Approximately one week later, Creek conveyed his individual interest in the development proj-

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[4] Creek reportedly paid $41,715 for one parcel and $528,100 for the other. (Orland Park, OFPD Contested Statement of Facts ¶ 26).

ect to the Pheasant Ridge Venture ("PRV") allegedly in order to "raise money to enforce the court order, pay litigation expenses and defray extraordinary expenses caused by the delay in the project due to the actions of defendant." (Creek's Statement of Contested Facts at 3). Creek owned a 90% share in the venture. (*Id*).

On August 28, 1980, following a hearing on Creek's contempt petition, the court entered an Agreed Order on August 28, 1980. Under the terms of the order, Westhaven was required to deposit "conditional" building permits with the court, to be released upon plaintiffs' compliance with certain conditions set out in the Order. (Agreed Order at ¶¶ 1, 9). Westhaven further agreed not to interfere with or prevent the construction of the project. (*Id.*, at ¶ 6). For their part, plaintiffs agreed not to bring any action against the Village or its officials for damages, costs or attorney's fees for a delay in construction. (*Id.*) Three days after the Agreed Order was entered, PRV and Shell Development Corp. formed a new partnership, Pheasant Ridge Associates, to obtain financing for and develop the Pheasant Ridge and Hunter Apartments.[5]

Around this time, many of the other defendants in this suit including Orland, OSD, and OFPD began openly opposing construction of the development. Plaintiff cites numerous letter-writing campaigns and the defendants' meetings among themselves and with various government officials as evidence of a growing conspiracy to block the project and exclude low-income minority

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[5] Once parties to this suit, the Shell Development Corp./ Pheasant Ridge Venture Partnership settled with defendants in October 1982.

tenants from residing in Westhaven and near Orland Park, and to exclude the children of these tenants from attending OSD. (Second Amended Complaint).

This increasingly vocal opposition to plaintiff's proposed development continued unabated for more than eighteen months following the entry of the Agreed Order. Contrary to the express terms of the Order, Westhaven refused to issue the required permits. Finally, in March 1982, plaintiff filed a motion with the Circuit Court seeking to enforce the Agreed Order. The state court again ordered Westhaven to file the building permits, this time by May 11, 1982. On May 17, 1982, after Westhaven had failed to deposit them with the court, the court entered an order stating that the order itself could serve as the required permits. On November 23, 1982, Westhaven finally deposited the permits with the court.

On March 3 and 4, 1983, Pheasant Ridge Associates commenced construction of the Hunter Apartments and Pheasant Ridge Apartments. The developments have since been completed, and are now 100% occupied.

Discussion

I. *Defendant Westhaven's Motion to Preclude Plaintiff from Presenting Any Evidence and Making Any Claim at Trial for Money Damages.*

Defendant Westhaven asserts that Creek is precluded from seeking any money damages from the Westhaven Defendants. Westhaven offers three separate grounds in support of its motion in limine. First, Westhaven claims that under the doctrine of *res judicata*, Creek is estopped from seeking money damages incurred prior to April 14, 1980. Second, Westhaven asserts that under the terms of

the August 28, 1980 Agreed Order, Creek waived his right to money damages altogether. Finally, Westhaven argues that defendants' settlement with plaintiffs/intervenors Shell Development Corp. and PRV precludes Creek from claiming and recovering any damages incurred after August 31, 1980.

A. *Res Judicata*

The full faith and credit statute, 28 U.S.C. § 1738, requires federal courts to give state court judgments "the same full faith and credit . . . as they have by law or usage in the courts of such state." Thus, under 28 U.S.C. § 1738, state court judgments must be given "the same preclusive effect that such judgments would be given by the rendering state." *Charles Koen & Assoc. v. City of Cairo*, 909 F.2d 992, 997 (7th Cir. 1990). *See also La Salle Nat'l Bank v. County of DuPage*, 856 F.2d 925, 930 (7th Cir. 1988) (quoting *Torres v. Rebarchak*, 814 F.2d 1219, 1222 (7th Cir. 1987). Here, the "rendering state" is Illinois. Therefore, the *res judicata* effect of the Circuit Court's April 14, 1980 judgment in *LaSalle National Bank, et al. v. Village of Westhaven* turns on Illinois law.

Under Illinois law, a final judgment on the merits rendered by a court of competent jurisdiction bars a subsequent action brought by the same parties and their privies involving the same claim, demand or cause of action. *Rodgers v. St. Mary's Hospital*, 597 N.E.2d 616, 621 (Ill. 1992); *People v. Progressive Land Developers, Inc.*, 576 N.E.2d 214, 218 (Ill. App. 1991). The doctrine of *res judicata* applies "not only to what actually was decided in the original action but also to matters which could have been decided in that suit." *Progressive Land*,

576 N.E.2d at 218 *(quoting LaSalle National Bank v. County Board of Scholl Trustees*, 337 N.E.2d 19, 22 (Ill. 1975)). Here, the parties agree that the state court's April 14, 1980 judgment was final and was rendered by a court of competent jurisdiction. Creek, however, asserts that because he was neither a party nor in privity with any of the parties in the state court case and because the two cases involve different causes of action, the doctrine of res judicata does not preclude his recovery of damages for Westhaven's pre-April 14, 1980 conduct.

1. *Same Parties / Privity*

The court agrees with Creek that he was not a party to the earlier state court litigation. As the court explained in *Collins v. St. Jude Temple No. 1*, 510 N.E.2d 979, 981 (Ill. App. 1987), a party is "one who is named as such in the record and has been properly served with [a] summons or has entered an appearance." *See also Schafer v. Robillard*, 17 N.E.2d 963, 967 (Ill. 1938). Though Creek obviously had a vital interest at stake in the state court suit, as Westhaven apparently concedes, he was neither a named plaintiff, nor had he entered an appearance in his individual capacity in the case. (Pl. Response Brief at 4).

Nevertheless, the court finds that Creek was in privity with Terracom, one of the two named plaintiffs in the suit. Under long-standing Illinois law, an individual is in privity with a former party to a judgment if after the institution of the suit, he obtains from that party an interest in the property that was the subject matter of the former suit. *Varley v. Pickens*, 424 N.E.2d 981, 984 (Ill. App. 1981) (citing *Schafer v. Robillard*, 17 N.E.2d 963,

967 (Ill. 1938)). As the court stated in *Schafer*, "[a] privy in blood or estate is one who derives title to the property in question by descent or purchase. A privy to a judgment or decree is one whose succession to the rights of property thereby affected occurred after the institution of the particular suit, and from a party thereto." *Schafer*, 17 N.E.2d at 966. *See also Smith v. Bishop*, 187 N.E.2d 217, 218 (Ill. 1962) (same); *Local 1006 v. Wurf*, 558 F. Supp. 230, 235-36 (N.D. Ill. 1982) ("privity exists among plaintiffs for purposes or *res judicata* . . . when assets and property rights are transferred") (citing *American Equipment Corp. v. Wikomi Manufacturing Co.*, 630 F.2d 544 (7th Cir. 1980).

Here, as plaintiff admits, he first gained an individual interest in the subject developments on January 1, 1980, over four months after Terracom instituted the state action. (Pl. Response Brief at 4). As noted above, at that time plaintiff purchased all of his partners' interest in the proposed development and an option to purchase the land on which the apartments were to be built. He exercised his option to purchase the land in May 1980, nine months after Terracom's institution of the state court suit. Under Illinois law, for *res judicata* purposes, Creek is in privity with Terracom, his predecessor in interest for the Pheasant Run Apartments and Hunter Apartments development project.

Creek attempts to confuse this simple application of black letter law by arguing that he cannot be bound by the prior state court judgment because of his limited participation and control over the state court action. (Pl. Response at 6). Creek argues that in considering privity, "the crucial distinction is the extent of participation by the party to be barred in the prior suit." (*Id. citing TRW,*

Inc. v. Ellipse Corp., 495 F.2d 314, 318 (7th Cir. 1974)). Creek is only partially correct. While it is true that a number of courts now look to factors such as the degree of participation by parties in earlier suits and the extent to which parties' interests were adequately represented in such suits (*see, e.g.*, *EEOC v. Harris Chernin, Inc.*, 767 F. Supp. 919, 923 (N.D. Ill. 1991); *Petit v. City of Chicago*, 766 F. Supp. 607, 613 (N.D. Ill. 1991); *Diaz v. City of Chicago*, 601 F. Supp. 1251, 1253 (N.D. Ill. 1984)), these cases merely offer an alternative means of showing that a party's claim or defense should be barred through the doctrines of *res judicata* or collateral estoppel.

They do not, as Creek suggests, add new conditions to the traditional law of privity. Instead, these cases have expanded the notion of privity to include parties not formerly reached under the traditional definitions. *See Diaz*, 601 F. Supp. at 1253 (noting "a loosening of the traditional and sometimes artificial limitations on the application of res judicata" and the "expanding notion of privity"); *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 459 F. Supp. 507, 512-18 (S.D. Fla. 1978) (suggesting that the mere opportunity to intervene is enough to preclude relitigation). In fact, the analysis used in these cases is only applicable where traditional privity rules are unavailing—for example, where a party's interest in the subject matter of the former suit *preceded* the institution of that suit. *See, e.g.*, *TRW, Inc. v. Ellipse Com.*, 495 F.2d 314, 318 (7th Cir. 1974) (examining degree of plaintiff's participation in former litigation only after confirming that plaintiff was not bound by traditional privity rule as former party's successor in interest). Because Creek obtained his interest in the subject developments *after* the institution of

the former suit, the extent to which he controlled the state court litigation is irrelevant to the court's determination that for res judicata purposes, he is in privity with Terracom.

2. *Same Cause of Action*

Creek contends that even if he is found to be in privity with Terracom, the doctrine of *res judicata* does not apply because the instant case involves a different cause of action from the one involved in the state court suit. As noted above, the doctrine of *res judicata* only bars subsequent actions involving the same claim, demand, or cause of action. *Rodgers*, 597 N.E.2d 616, 621 (Ill. 1992).

Illinois courts have adopted two tests to determine whether causes of action are the same for *res judicata* purposes. *Rodgers*, 597 N.E.2d at 621. Under the "same evidence" test, *res judicata* bars a second suit "if the evidence needed to sustain the second suit would have sustained the first, or if the same facts were essential to maintain both actions."[6] *Id.* (*citing Pfeiffer v. William Wrigley Jr. Co.*, 484 N.E.2d 1187 (Ill. App. 1985). The

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[6] As numerous courts have observed, the "same evidence" test appears at odds with the Illinois rule that the doctrine of *res judicata* applies not only to claims raised in the prior proceeding but to all claims that could have been raised in that proceeding. *See e.g.*, *Hagee v. City of Evanston*, 729 F.2d 510, 514 n.7 (7th Cir. 1984) ("[s]trict application of a proof test . . . would allow litigants to circumvent the rule requiring them to consolidate closely related matters. They could do this by altering some aspects of their basic claim from one suit to the next, thus contriving a distinction in the proof required for the maintenance of each suit and preventing the application of *res judicata*.").

second test, the "transactional" approach, considers whether both suits "arise from the same transaction, incident, or factual situation."[7] *Rodgers*, 597 N.E.2d at 621.

Having carefully reviewed the parties' submissions relating to the prior state court proceeding, and of course, the materials submitted in relation to the instant suit, the court concludes that the two suits do constitute the "same cause of action" under Illinois law.[8] As plaintiff plainly acknowledges, both cases find their origins in Westhaven's efforts to hinder the development of the Pheasant Run and Hunter developments. In the state court action, Terracom alleged that Westhaven's failure to approve the final plans for the development and issue the required building permits caused it "to suffer severe and continuing financial losses due to payments on land, increased building costs, loss of profits and other damages. . . ." (State Court Complaint at ¶ 16). These same allegations are present in Creek's federal action. As in the state court suit, Creek essentially alleges that Westhaven and the other defendants unlawfully sought to delay his project. *See* Second Amended Complaint (alleging in part, "[b]y reason of Defendants' wrongful refusal to approve Plaintiff's Final Plans and to issue building

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[7] The transactional approach is considered to be the favored approach among courts nationwide. *See* Restatement (Second) of Judgments § 24 comments a,b,c (1980).

[8] As the court explains in more detail below, this finding is limited to plaintiff s claims arising out of Westhaven's pre-state suit conduct. Any claims against Westhaven that arose subsequent to the filing of the state court suit are not barred under the doctrine of *res judicata*. *Green v. Illinois Dept. of Transportation*, 609 F. Supp. 1021, 1024-25 (N.D. Ill. 1985).

permits, plaintiff had been delayed in closing on the financing commitments of Hunter Apartments and for Pheasant Ridge Apartment."). The mere fact that plaintiff now bases his claim for relief on various constitutional theories, not raised in the state court suit is not dispositive. As defendant points out, Terracom could have easily raised these same constitutional claims in the state suit, but instead chose not to do so.[9]

The court's conclusion that the two cases involve the same causes of action is consistent with the Seventh Circuit's findings in *Hagee v. City of Evanston*, 729 F.2d 510 (7th Cir. 1984) and *Wozniak v. Du Page County*, 845 F.2d 677 (7th Cir. 1988), two cases involving fact patterns strikingly similar to the one presented here. In *Hagee*, the plaintiffs brought suit in Cook County Circuit Court seeking to enjoining the city from interfering with the completion of the plaintiffs' construction project through its revocation of the project's building permits. After obtaining injunctive relief from the state court, the plaintiffs filed a Section 1983 action in federal court, claiming that the permit revocation constituted a taking in violation of the Fifth and Fourteenth Amendments. *Hagee*, 729 F.2d at 511-12. Similarly, in *Wozniak*, plaintiffs sought an order challenging the issuance of an excavation permit from the state court and then later brought a Section 1983 action in federal court. *Wozniak*, 845 F.2d 677, 681. In both cases, the court held that the doctrine

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[9] Under Illinois law, Terracom not only could but should have joined its § 1983 and related constitutional claims with its mandamus claim in state court. *See Button v. Harden*, 814 F.2d 382, 384 (7th Cir. 1987) *(citing Edwards v. City of Quincy*, 464 N.E.2d 1125 (1984)).

of res judicata applied because the state and federal court suits arose from the same set of facts.

Accordingly, the court finds that this case and the prior state court litigation both involve the same cause of action for *res judicata* purposes.

3. *The Scope of the Res Judicata Effect of the Prior State Court Action*

The court's conclusion that the two cases involve the same cause of action does not, however, end its inquiry. The court must now determine the scope of the *res judicata* effect of the prior state court action. Westhaven asserts that *res judicata* bars any claim for damages based on its pre-April 14, 1990 conduct. April 14, 1980 was the date the state court entered judgment in favor of plaintiff Terracom. Creek, on the other hand, asserts that the doctrine of *res judicata* only covers his claims for damages based on Westhaven's actions taken prior to August 29, 1979, the date the state court suit was commenced. According to Creek, subsequent discrete acts giving rise to separate claims should not be precluded by the state court action.

Having reviewed the relevant case law, the court concludes that *res judicata* only bars Creek from claiming damages for those actions taken by Westhaven prior to the filing of the state court suit. Later *separate* acts not encompassed within the express allegations contained in Terracom's August 29, 1979 complaint are not barred. As the Seventh Circuit noted in *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 915 (7th Cir. 1993), "plaintiffs need not amend filings to include issues that arise after the original suit is lodged." *See also Green v. Illinois Dept. of*

Transportation, 609 F. Supp. 1021 (N.D. Ill. 1985). To require plaintiffs to either amend their complaints each time a defendant commits a new wrong or risk the potential preclusion of all future claims for damages ongoing misconduct.

Creek also asserts that the doctrine of *res judicata* cannot bar his conspiracy claims against Westhaven because these claims did not accrue until after the entry of the state court judgment in April 1980.[10] The court agrees. As noted above, *res judicata* generally only bars claims for damages that arise prior to the initiation of the earlier suit. To the extent that Creek can show that his conspiracy claims did not accrue until after the filing of the state court complaint, the claims are not barred.[11] This is true even though they may be based in part on conduct that occurred prior to the filing of the state court complaint. To hold otherwise would unfairly preclude Creek from raising claims that he and his predecessor were unable to raise in the state court suit.

B. *Waiver*

Westhaven asserts that Creek waived his right to sue for damages through his predecessor's consent to the

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[10] According to Creek, "only then [after April 14, 1980] did it become clear that Westhaven's seemingly isolated actions were in fact part of a concerted effort to block the project." (Response at __).

[11] In this regard, the court notes that civil conspiracy claims are generally held to accrue when the plaintiff knows or should know that he is suffering from a wrong for which damages may be recovered in a civil action. *Wilson v. Giesen*, 956 F.2d 738, 740 (7th Cir. 1992).

Agreed Order entered on August 28, 1980. Under the terms of the Agreed Order, Creek's predecessor, Terracom, agreed "not to bring any action against the village or its officials for damages, costs or attorney's fees for a delay in construction." Though Westhaven apparently acknowledges that plaintiff did not individually consent to the Agreed Order, defendant argues that "Creek should be estopped form continuing with this lawsuit given his free and voluntary waiver of his right to sue the Westhaven defendants for damages." (Pl. Brief at 13). The court disagrees.

Creek's predecessor's waiver of its right to sue for damages was conditioned on defendant's promise to comply with the conditions of the Agreed Order. Under the terms of the Agreed Order, Westhaven was required to deposit the conditional building permits with the court and refrain from interfering with or attempting to prevent the construction of the project. (Agreed Order at ¶ 6). As noted above, contrary to the express terms of the Agreed Order, Westhaven refused to issue the required permits, and continued to work to block the construction of the Hunter Apartments and Pheasant Ridge Apartments. These actions constituted a material breach of the Agreed Order, discharging Terracom's (and to the extent that he was bound by the Agreed Order, Creek's) duty to perform. *Borys v. Rudd*, 566 N.E.2d 310, 315 (lst Dist. 1990). As plaintiff asserts, it would be unjust to hold Creek accountable to an agreement that defendant had so clearly repudiated. *Lundberg v. Church Farm, Inc.*, 502 N.E.2d 806, 814 (Ill. App. 1986) ("[w]hether or not a breach of contract is 'material', thereby discharging the other's duty to perform, is a question to be decided on 'the inherent justice of the matter' ") (citations omitted).

C. *Effect of Shell/PRV Partnership Settlement Agreement*

Finally, Westhaven claims that the October 12, 1992 Settlement Agreement between defendants and the Shell/PRV Partnership bars Creek from recovering any damages incurred after August 31, 1980, the date the Shell/PRV Partnership was formed. (Def. Brief at 13). Under Paragraph 5 of the Agreement, the Shell/PRV Partnership, Shell, and PRV released defendants from any and all claims arising out of their dispute. However, as plaintiff points out, the same paragraph further provides that:

> this paragraph shall not be considered or construed to release, affect or in any way concern . . . the individual claims now asserted or which later may be asserted by J. Fred Creek against the Defendant released parties in the Litigation, stemming from his individual claims in connection with the Housing Development, and arising in connection with his sole ownership of the Housing Development from January 1, 1980 to July 1, 1980.

(Oct. 12, 1992 Settlement Agreement ¶ 5). While as a practical matter Creek may find it difficult to show how he incurred any individual damages after July 1, 1980, the date he assigned his entire individual interest in the development to PRV (let alone the August 31, 1980 date which defendant cites here), nothing in the October 12, 1992 Settlement Agreement prevents him from trying. Defendant's motion to bar Creek from pursuing any individual damages incurred after August 31, 1980 is denied.

In conclusion, the court holds that the doctrine of *res judicata* bars all of Creek's claims for damages that are based on Westhaven's individual conduct occurring prior to August 19, 1979. It also bars any claims for damages

based on conduct that: 1) was specifically alleged in the state court complaint; and 2) occurred prior to the entry of the state court judgment on April 14, 1980. Finally, to the extent that Creek can show that his conspiracy claims did not accrue until after the filing of the state court complaint, he can base his conspiracy claims in part on conduct that occurred prior to that date.

II. *Plaintiffs Motion in Limine Relating to Previously Litigated Issues*

Plaintiff moves to collaterally estop defendants from relitigating certain issues that he claims were previously decided in the state court suit.[12] "Collateral estoppel acts to bar the retrial of an issue that has been fairly and completely resolved in a prior proceeding." *In re Nau*, 607 N.E.2d 134, 142 (Ill. 1992). Like the doctrine of res judicata, the doctrine of collateral estoppel is designed to " 'promote judicial economy and prevent repetitive litigation.' " *Benedick v. Mohr*, 600 N.E.2d 63, 65 (Ill. App. 1992) (*quoting Stratemeyer v. West*, 484 N.E.2d 399, 400 (Ill. App. 1985). Under 28 U.S.C. § 1738, the full faith and credit statute, the extent to which a state court decision collaterally estops the litigation of issues raised in a subsequent federal suit turns on state law. *Charles Koen & Assoc. v. City of Cairo*, 909 F.2d 992, 997 (7th Cir. 1990).

Under Illinois law, the doctrine of collateral estoppel applies if:

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[12] The original motion in limine on this issue was filed by Shell in May 1989. In September 1992, just before Shell dropped out of the suit, Creek adopted Shell's motion as his own.

> (1) the issue decided in the prior adjudication is identical with the one presented in the current suit; (2) the prior suit was terminated with a final judgment on the merits; and (3) the party against whom the estoppel is asserted was a party or in privity with a party in the prior suit.

Nau, 607 N.E.2d at 143. The party asserting estoppel must prove that the issue was either "controlling" or "material" and had been "actually litigated or decided" in the prior action. *Benedick*, 600 N.E.2d at 65.

At the outset, the court rejects any attempt by plaintiff to prevent Orland Park, OFPD, and OSD from contesting any relevant issues previously decided by the state court judge in *LaSalle National Bank, et al. v. Village of Westhaven*, No. 79 L 19122. Since these defendants were neither parties nor privies to the state court suit, they cannot be collaterally estopped from relitigating issues decided against their co-defendant Westhaven. With regard to Westhaven, the court notes that after initially arguing that the individual members of Westhaven's Board of Trustees were not in privity with the Village of Westhaven in the state court suit, the Westhaven defendants have now conceded the privity issue. (Oct. 16, 1992 Response at 1). *See Mandarino v. Pollard*, 718 F.2d 845, 850 (7th Cir. 1983) (recognizing principle that a government and its officers are in privity for res judicata purposes).

Thus, the remaining question is whether the disputed issues were either "material or controlling" and were actually litigated or decided in the state court suit. On this score, plaintiff lists the following 13 issues which he contends were "litigated and decided against Westhaven" by the state court:

a. That plaintiffs (to the state court litigation) did not initially submit to Westhaven appropriate building permit applications, required plans, specifications, other documentation, and building permit fees;

b. That plaintiffs had not exhausted their administrative remedies;

c. That plaintiffs did not present Westhaven with appropriate loan commitments;

d. That plaintiffs did not pay for BOCA plan and permit reviews;

e. That plaintiffs' building permit application did not contain a proper legal description of the subject property;

f. That plaintiffs did not proved Westhaven with a list of construction subcontractors;

g. That changes in building plans created the potential for water detention problems;

h. That a proposed access road for policemen and firemen would not be built;

i. That plaintiffs planned to build only 176 apartment units, rather than the 216 units first proposed;

j. That the Northeastern Illinois Planning Commission was reviewing the development and had not as yet made a final determination;

k. That plaintiffs did not have an appropriate letter of credit for certain public improvements;

l. That plaintiffs did not deposit the building permit fees into an escrow account; and

m. That plaintiffs' general contractors and subcontractors had not obtained appropriate licenses.

(Motion at 2-3).

According to Creek, each of the above issues had been offered as a rationale for Westhaven's refusal to issue the required building permits. (Motion at 2). Though Creek clearly has the burden of persuasion on this issue, he has neglected to document precisely when, and in what manner, these issues were supposedly decided. Instead, Creek simply asserts that [e]ach of these arguments was rejected in the state court litigation," offering only a voluminous bound copy of the state court proceeding "[f]or the Court's convenience" in support of his claim. (*Id.*). Having reviewed the state court pleadings, the court finds that only one of the state court's orders, its April 14, 1980 judgment, could properly be deemed to have actually decided any of the issues raised by plaintiff in the instant motion.[13]

Specifically, the court finds that:

1. Under issue "a", plaintiff did in fact submit to Westhaven the required plans. (April 14, 1980 Judgment ¶ 7).
2. Under issue "b", plaintiff's predecessor did in fact exhaust his required administrative remedies prior to bringing the state court suit. April 14, 1980 Judgment ¶ 9).
3. Under issue "i", plaintiff's plans for Phases I and II of the development project contemplated the construction of 216 units.
4. Plaintiff had complied with the building code, zoning ordinance, and pre-annexation agreement. (April 14, 1980 Judgment ¶ C).

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[13] In addition to the April 14, 1980 Order, the court reviewed the state court's Agreed Orders, dated August 28, 1980 and April 29, 1982, and the state court's May 17, 1982 order.

Defendant Westhaven is therefore, collaterally estopped from relitigating any of these issues. All other matters not encompassed within the scope of these previously decided issues are not barred by the doctrine of collateral estoppel, and can be fully litigated at trial.

III. *Plaintiff's Motion to Limit Defendant's Peremptory Challenges*

28 U.S.C. § 1870 provides that each party in a civil action is entitled to three peremptory challenges. In cases involving several defendants or several plaintiffs, § 1870 provides the court with broad discretion in determining the number of challenges available to each "side" of the lawsuit.[14] *Dunham v. Frank's Nursery & Crafts, Inc.*, 919 F.2d 1281, 1287 (7th Cir. 1990). Plaintiff now moves to limit the number of peremptory challenges available to defendants. Plaintiff asserts that to allow each defendant in this action three separate challenges, would "hamper the jury process", "cause unnecessary delay," and would severely prejudice plaintiff, who is only allocated three challenges under § 1870. (Motion at 2). In response, Defendants Orland Park et al. argue that in light of defendants' separate defenses to plaintiffs suit, it would be unfair to treat them as a single party. (Response at 4). Limiting them to a total of three peremptory challenges, defendants assert, would "severely prejudice the defendants' ability to select a fair and impartial

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[14] 28 U.S.C. § 1870 provides in pertinent part: "Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional Peremptory challenges and permit them to be exercised separately or jointly."

jury in this matter." (*Id.*) Recognizing the validity of both plaintiff's and defendants' concerns, the court grants each "side" six peremptory challenges.

Conclusion

For the foregoing reasons, the court rules as follows: Westhaven's Motion to Preclude Evidence and Claims for Damages is granted in part and denied in part; Plaintiff's Motion Regarding Previously Litigated Issues is granted in part and denied in part; and Plaintiff's Motion to Limit Defendant's Peremptory Challenges is granted in part and denied in part.

E N T E R:

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Ann Claire Williams, Judge
United States District Court

Dated: Dec. 21, 1993

[Dated January 24, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

J. FRED CREEK, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 83 C 1851
	)	
	)	
VILLAGE OF WESTHAVEN, et al.,	)	Honorable Paul E. Plunkett
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

This matter is before the court on the collective and individual motions for summary judgment of defendants Village of Westhaven, et al. ("Westhaven"), Orland Park, the Orland Fire Protection District ("OFPD"), and the Orland School District No. 135 ("OSD"). For the reasons stated below, the motions for summary judgment are granted. This case is dismissed.

Background

The long and complex history of this case and most of the relevant facts have been adequately set forth in this court's numerous prior rulings. (*See*, *e.g.*, Dec. 21, 1993 Memorandum Opinion and Order at 1-8; Apr. 10, 1992 Memorandum Opinion and Order at 2-6). This information need not be repeated here.

As the parties are painfully aware, the court invited this motion for summary judgment last December, literally on the eve of trial, following a two-day hearing on defendants' various pretrial motions. Immediately prior to the hearing, the court had ruled on several of defendants' other pretrial motions.[1] These rulings, especially when read in conjunction with Paragraph 5 of the October 12, 1992 Settlement Agreement, focused the court's and the parties' attention on several apparent inconsistencies in plaintiffs theory of the case. (*See generally* December 22, 1993 Hearing Tr. at 20-29). Undeniably, the nature of the case had changed dramatically in the one and one-half years following the court's April 10, 1992 ruling on defendant's prior motion for summary judgment. Faced with the prospect of a six-week jury trial in a case where plaintiff himself had no clear sense of the timing or scope of the illegal conspiracy giving rise to his claims, nor a clear explanation for how he was individually damaged by defendants' conduct, the court continued the trial, and invited defendants to file a renewed motion for summary judgment, focusing on the various issues raised at the hearing. The instant summary judgment motion became fully briefed roughly six months later. The parties' briefs run more than 130 pages in length and the scores of attached exhibits exceed 1000 pages.

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[1] Among its other rulings, the court held that the doctrine of *res judicata*, barred all of Creek's claims for damages based on Westhaven's pre-August 19, 1979 conduct and any claims for damages based on conduct that: 1) was expressly alleged in the state court complaint, and 2) occurred prior to the entry of the state court judgment on April 14, 1980. (Dec. 21, 1993 Memorandum Opinion and Order at 21-22).

DISCUSSION

I. Conspiracy

A. Could a jury reasonably infer that there was an illegal conspiracy to block the Pheasant Ridge and Hunter Developments between January 1, 1980 and July 1, 1980?

As this court observed in its April 10, 1992 Memorandum Opinion and Order, to establish a valid claim under 42 U.S.C. § 1985(3), Creek must prove five elements:

> 1) a conspiracy, 2) motivated by racial or other class-based invidious discriminatory animus, 3) for the purpose of depriving, directly or indirectly, any person or class of persons of equal protection of the laws, or of equal privileges and immunities under the laws, 4) that the conspirators committed some act in furtherance of the conspiracy, and 5) that the plaintiff was either injured in his person or property or was deprived of having and exercising any right or privilege of a citizen of the United States.

(Apr. 10, 1992 Memorandum Opinion and Order at 12-13 (citing *Stevens v. Tillman*, 568 F. Supp. 289, 292 (N.D. Ill. 1983)). The first and most fundamental element of Creek's section 1985 claim, the existence of a conspiracy, is the first issue to be addressed.

For Creek to recover individual damages, he must show, at a minimum, that the alleged conspiracy existed during the six-month period (January 1, 1980 – July 1, 1980) in which he owned the development in his individual capacity. Yet, at several points during the December 1993 pretrial hearing, Creek's counsel appeared to be arguing that the alleged conspiracy did not begin until fall of 1980, after Creek had transferred his individual interest in the development to the Pheasant Ridge Ven-

ture ("PRV"). (*See, e.g.*, Dec. 21, 1993 Hearing Tr. at 76, 77-78; Dec. 22, 1993 Hearing Tr. at 25). Despite being given ample opportunity to clarify his position, plaintiffs counsel failed to articulate a coherent theory relating the acts of defendants Orland Park, OFPD, and OSD to the critical January-July 1980 period. After inviting the present motion for summary judgment, the court directed Creek to clarify his theory on the timing and scope of the alleged conspiracy in his response. Having carefully reviewed the parties submissions, the court concludes that there are genuine issues of material fact concerning the existence of an illegal conspiracy to block the Pheasant Ridge and Hunter apartment project while Creek was the sole owner of the developments.

A civil conspiracy has been defined as:

> a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties to inflict a wrong against or injury upon another, and an overt act that results in damage.

Scherer v. Balkema, 840 F.2d 437 (7th Cir. 1988) (quoting *Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979)); *see also Bell v. City of Milwaukee*, 746 F.2d 1205, 1255 (7th Cir. 1984). An express agreement among all the participants is not required for a conspiracy to exist. Nor is a showing that each participant in the conspiracy knew the precise bounds of the illegal plan.

> The participants in the conspiracy must share the general conspiratorial objective, but they need not know all the details of the plan designed to achieve the objective or possess the same motives for desiring the intended conspiratorial result. To demonstrate the existence of a conspiratorial agreement, it simply

> must be shown that there was a single plan, the essential nature and general scope of which [was] known to each person who is to be held responsible for its consequences.

Bell, 746 F.2d at 1255 (quoting *Hampton*, 600 F.2d at 620-621) (citations omitted). As this court noted in its April 10, 1992 ruling, the existence of an illegal conspiracy ordinarily cannot be decided on a motion for summary judgment. " 'The question of whether an agreement exists should not be taken from the jury in a civil conspiracy case so long as there is a possibility that the jury can infer from the circumstances [that the alleged conspirators] had a 'meeting of the minds' and thus 'reached an understanding' to achieve the conspirators' objectives." (Apr. 10, 1992 Memorandum Opinion and Order at 13) (quoting *Hampton*, 600 F.2d at 621).

Plaintiff offers two complementary theories in support of his claim that a conspiracy to block the Pheasant Ridge and Hunter development existed during his individual ownership of the project. Under the first theory, beginning in January 1979 and continuing through Creek's sole ownership of the development, the Village of Westhaven, its mayor, its trustees, the village zoning and planning board, and the village engineer conspired to block the developments to keep African-Americans out of Westhaven. Creek's second theory is somewhat broader, encompassing the conduct of the various Westhaven actors and later (but still pre-July 1, 1980) efforts by various members of the Westhaven Homeowners Association to block the development. Finding sufficient evidence in the record to support a jury finding of conspiracy during the critical six-month period under Creek's first

theory, the court will not address this second, alternative argument.

Briefly summarized, Creek's theory of the pre-July 1, 1980 conspiracy is as follows. Up until January 1979, Westhaven, its trustees, and its zoning and planning committees were solidly behind the Pheasant Ridge and Hunter development. However, things changed suddenly on January 9, 1979, when the Department of Housing and Urban Development (HUD) informed the Village of Westhaven that the developers had applied for Section 8 rent support for forty percent of the 216 planned units. Ten days later, the conspiracy to block the development was underway when Westhaven's mayor, at the urging of Village trustee Lorin Schab, shot off a letter to HUD protesting the inclusion of multiple Section 8 units. As Creek notes, all of the Village trustees are copied on the letter. (Creek Response at 9).

On March 14, 1979, the Board of Trustees refused to approve the developments' plans despite favorable recommendations from the Village Engineer and the Village Planning and Zoning Commission. A few weeks later, the Planning Commission withdrew its prior approval of the development, citing numerous, previously undiscovered problems. The Planning Commission's decision was ostensibly based in part on a letter from the Village's engineer reversing his prior approval of the project. According to Creek, the village engineer reconsidered his prior assessment of the development at the express urging of the mayor. (*Id.* at 10-12).

The Village of Westhaven's opposition to the development allegedly continued through July 1980. As Creek notes, Westhaven refused to issue the building permits and approve the plan throughout the pendency of the

state court suit. Indeed, Westhaven continued to refuse to issue the required permits even after the entry of the state court judgment on April 14, 1980.

Creek offers significant documentary support for his pre-July 1, 1980 conspiracy theory, including, *inter alia*, copies of the key letters, minutes for the various Board of Trustees and Planning and Zoning Commission meetings about the developments, and deposition testimony. (*See generally* Pl. Ex. 6-14, 17; Pl. Response at 9-14). This evidence, when taken as a whole, could allow a reasonable fact-finder to infer that the mayor of Westhaven, its trustees, planning and zoning committee, and village engineer acted in concert to block the developments prior to and through Creek's sole ownership of the development, once they learned of the Section 8 financing plan.

Defendants do not challenge (at least for the limited purpose of the court's inquiry here) the accuracy of Creek's account of material events. Instead, defendants argue that even if the above acts took place as Creek has described them, he would not have established the required pre-July 1, 1980 conspiracy because all of the alleged conspirators are members or agents of a single entity the Village of Westhaven. The court disagrees.

The intra-corporate conspiracy doctrine relied on by defendants has long been held to bar recovery under Section 1985(3) on mere proof "that a discriminatory business decision reflects the collective judgment of two or more executives of the same firm." *Dombrowski v. Dowling*, 459 F.2d 190, 196 (7th Cir. 1972). As then Judge Stevens explained, even though an agent acting within the scope of his authority could still be found, under special circumstances, to have conspired with his higher-ups in violation of Section 1985:

> if the challenged conduct is essentially a single act of discrimination by a single business entity, the fact that two or more agents participated in the decision or in the act itself will normally not constitute the conspiracy contemplated by this statute.

Id.

Thus, in *Travis v. Gary Community Mental Health Center, Inc.*, 921 F.2d 108 (7th Cir. 1990), the court held that a single act of retaliatory discharge agreed upon by three executives at the same company regarding a single employee did not give rise to a Section 1985(3) conspiracy. The court further noted that even if the discharge could have been broken down into a sequence of discriminatory acts, for example, first demoting the employee and then discharging him, the result would be the same. "Section 1985 depends on multiple actors, not on multiple acts of discrimination or retaliation." *Id.* at 111.

However, as the Seventh Circuit later acknowledged in *Hartman v Board of Trustees*, 4 F.3d 465, 470-71 (7th Cir. 1993), the court's holdings in *Travis* and *Dombrowski* do not preclude liability for Section 1985 intra-enterprise conspiracies where the alleged conduct is part of a broad discriminatory scheme or a pervasive pattern of discrimination. *Hartman* involved an alleged agreement between two city college officials to restrict the scope of a book distribution program to non-Latinos. *Id.* at 467. While affirming the dismissal of plaintiff's section 1985 claim because "[t]he alleged conspiracy was rather limited both in its immediate object . . . and in its membership" the court suggested that a claim would have been stated had plaintiff alleged that "the conspiracy was part of some broader discriminatory pattern or that it in any

way permeated the ranks of the organization's employees." *Id.* at 470-71.

Defendants urge an extremely narrow reading of this "exception" to the intra-enterprise conspiracy doctrine. Relying primarily on an illustration of a viable section 1985 intra-enterprise conspiracy offered by the court in *Travis*, defendants assert that intra-enterprise conspiracies must reach "KKK-type proportions" to give rise to liability under Section 1985. (Def. Reply at 18). The court in *Travis* stated:

> Members of the Klu Klux Klan could not avoid liability by incorporating, for they would still be trying to organize (through persuasion or terror) multiple centers of social or economic influence. The Klan meddled in the business of others; that is what made it dangerous. The [defendant] minded its own business.

Travis, 921 F.2d at 110. Neither *Travis* nor *Hartman*, however, suggest that Klu Klux Klan type activity represents some sort of minimum threshold for intra-enterprise liability. Indeed, on at least one occasion, a court within the Seventh Circuit has held that Section 1985 intra-enterprise liability can be properly founded on much less. *See Craft v. Board of Trustees*, 516 F. Supp. 1317 (N.D. Ill. 1981) (Flaum, J.) (intra-enterprise liability appropriate where various university officials alleged to have engaged in a complex scheme to restrict opportunities for African-American medical students).

The intra-enterprise conspiracy doctrine serves as a valuable, and analytically sound, check on the potential misuse of Section 1985. Clearly, an internal business decision, even if bigoted, should not give rise to Section 1985 liability simply because it was made by a plurality

of executives. However, where as here, a plaintiff has alleged a broad conspiracy involving numerous loosely affiliated actors, all engaged in a complex discriminatory scheme (in this case, to restrict affordable housing opportunities for African-Americans and in essence, keep African-Americans out of their community), we have moved far afield from the isolated employment decisions at issue in *Travis* and *Hartman*. Under these circumstances, a rigid application of the intra-enterprise conspiracy doctrine is unwarranted. Finding that Creek has alleged, and provided some evidence of, a broad discriminatory scheme permeating the ranks of Westhaven's employees and officials, the court holds that the intra-enterprise conspiracy doctrine does not bar the instant suit.

B. Could a Jury Reasonably Infer that the Non-Westhaven Defendants Joined the Pre-July 1, 1980 Conspiracy to Block the Developments?

(1) *OSD*

Like the other non-Westhaven defendants, OSD argues that even if it could be established that an illegal conspiracy to block the developments existed during Creek's sole ownership of the property, Creek has failed to come forward with any evidence showing that OSD joined this conspiracy. OSD's argument takes two tacks. Neither is persuasive.

OSD first argues that, at best, all Creek can show is that there were two separate conspiracies to block the developments. The first, involving the Westhaven defendants and possibly the Westhaven Homeowners Association, began in January 1979 and effectively ended in the spring of 1980 with the state court entry of final

judgment in favor of Terracom. The second conspiracy, the letter-writing campaign, began in October 1980, several months after Creek divested himself of any individual interest in the development. Under this theory, OSD and the other non-Westhaven defendants cannot be held responsible for any acts committed while Creek owned the property because the only conspiracy they could arguably be said to have joined did not begin until after he had transferred his interest to PRV.

In support of this characterization of Creek's claim, OSD relies heavily on the statements of Creek's counsel at the December 21-22, 1993 pre-trial hearings. As OSD correctly notes, at numerous times during the hearing, Creek's counsel indicated that the conspiracy did not begin until 1980, and when pressed, conceded that the conspiracy did not begin until after August 1980. (*See* Dec. 2 1, 1993 Hearing Tr. at 76, 77-78; Dec. 22, 1993 Hearing Tr. at 25). At other times, however, Creek's counsel suggested that the conspiracy actually started back in January 1979 when the Westhaven defendants first began to actively oppose the developments. (*See* Dec. 22, 1993 Hearing Tr. at 11). In the court's view, what Creek's counsel said or did not say at the December 1993 hearings is irrelevant. This case is complex, and as the parties are aware, the broad scope of the December hearings was not anticipated by this court or the parties themselves. The court will not hold Creek accountable for any representations about the scope and timing of the alleged conspiracy that were made at last December's hearings. Indeed, the court invited the instant motion for summary judgment for the primary purpose of cutting through the confusing and conflicting arguments offered at the December hearings and to afford each party one

last opportunity to carefully and deliberately articulate its theory of the case.

This being said, the court finds that Creek has submitted sufficient evidence from which a jury could reasonably infer that the letter-writing campaign that began in the fall of 1980 and the earlier Westhaven-based opposition to the developments were part and parcel of the same illegal conspiracy to block Creek's project and keep African-Americans out of Westhaven. As Creek notes, many of the actors allegedly involved in the two endeavors overlap. In particular, the court notes that the Mayor of Westhaven and the various Westhaven Trustees who also served as members of the Westhaven Homeowners Association participated in both phases of the alleged conspiracy. The proximity in time of the two campaigns is also relevant. As noted previously, the letter-writing campaign began shortly after the entry of the August 28, 1980 Agreed Order in the state court suit. The entry of this order clearly marked the Westhaven defendants' failure to block the development through state court litigation. If the campaign was to be successful, broader support and new tactics were needed. Finally, the court notes that the objectives of the two campaigns were identical, even though the relative positions of the parties required them to employ different means to achieve their goal. Taken together, these factors could allow a reasonable fact-finder to infer the existence of a single grand conspiracy to block the development and keep African-Americans out of the Westhaven-Orland Park community.

OSD next argues that there simply is not enough evidence linking its limited opposition to the developments to the alleged broader scheme for a fact-finder to reason-

ably infer that it was a member of the conspiracy. The court disagrees. As previously noted, existing conspiracy law requires only limited proof of an alleged co-conspirator's participation for the creation of a genuine issue of material fact on the existence and scope of an alleged conspiracy. Because direct evidence of an illegal conspiracy is rarely available, courts have long allowed plaintiffs to rely on purely circumstantial evidence in support of their claims. *Quinones v. Szoric*, 771 F.2d 289, 291 (7th Cir. 1985).

Here, despite OSD's assertions to the contrary, Creek has come forward with considerable (at the very least, sufficient) circumstantial evidence from which a jury could reasonably infer that OSD was aware of the essential nature and general scope of the alleged conspiracy to halt the development and keep African-Americans out of Westhaven and that it shared the same general conspiratorial objective as its co-defendants. This evidence primarily consists of a series of correspondences between OSD and various governmental officials and entities and importantly, between OSD and some of the alleged co-conspirators. The court cites the following key excerpts from Creek's response:

* "Within a four day period in May 1981 the Village of Orland Park, *Orland School District No. 135*, the Westhaven Homeowners Association, Orland Township, and the Orland Area Homeowners Council wrote to Congressman Derwinski to lobby him to prevent the development from being built. Three of those letters were mailed on May 22, 1981."
* "At exactly the same time in May 1981, the Village of Orland Park, the Village of Westhaven, *Orland School District No. 135*, the Orland Area Homeowners Council, and the Cherry Hill Farms Homeown-

ers Association in nearby Tinley Park lobbied David Stockman, then head of the federal Office of Management and Budget. Three of those letters were mailed on May 21, 1981. The other two were mailed on May 22, 1981."

* "On December 2, 1980, *Orland School District No. 135* wrote to Consolidated High School District No. 230, a neighboring school district, to encourage another letter of protest to IHDA. *Defendant OSD No. 135* enclosed a copy of its own letter to IHDA."

* The Westhaven Homeowners Association letter to Governor Thompson on June 18, 1981 enclosed an additional letter of opposition from State Senator Mahar . . ., Westhaven Mayor O'Brien . . . *Orland School District No. 135*, the Village of Orland Park, Orland Fire Protection District. . . . Each of those individuals and organizations, plus Congressman Derwinski, were shown as copies on the letter."

* "Michael Daum as president of the Westhaven Homeowners Association on January 9, 1982, wrote a lengthy protest letter to HUD. He enclosed 21 opposition letters from other [alleged] conspirators and showed them all as copies: President of the Orland Fire Protection District Kenneth Apel, Orland Park Mayor Doogan, *Orland School District No. 135. . . .*"

* "Many of the same people are shown as copies on Mr. Daum's April 16, 1982 [sic) letter to the Leadership Council for Open Communities. This letter copied Orland Park Village Manager Lynn Neuhart, Mayor Melvin Doogan or Orland Park, defendants Orland Fire Protection District and *Orland School Dist, No. 135*, Mayor O'Brien. . . ."

(Creek Response at 19-22). Though hardly definitive proof of OSD's membership in the alleged conspiracy, in this court's view, these correspondences, when viewed

collectively and in the context of the parallel efforts of the alleged co-conspirator, would allow a jury to reasonably infer that OSD participated in the same illegal conspiracy launched by the Westhaven defendants back in January 1979.

(2) *Orland Park*

Orland Park, like OSD, asserts that there are two separate conspiracies at issue, and that the letter-writing campaign engaged in by the non-Westhaven defendants cannot be fairly characterized as part of the pre-July 1, 1980 Westhaven-based effort to block the developments. While certainly a plausible characterization of the material events, this is an argument best made to a jury. Given the common goal of co-defendants' endeavors, the proximity in time of their actions, and the presence of many of the same actors in both campaigns, the court believes a jury could reasonably infer the existence of a single conspiracy (albeit one with two distinct phases) to block the developments and keep African-Americans out of Westhaven.

(3) *OFPD*

Creek's case against OFPD deserves separate treatment. In contrast to his case against the other non-Westhaven defendants, Creek's only claim against OFPD is for tortious interference with prospective business relations.[2] More importantly for present purposes, Creek

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[2] The court granted OFPD's motion for summary judgment on the Section 1985(3) claim in its August 1992 ruling. (Aug. 10, 1992 Opinion at 17-19).

offers significantly less evidence linking OFPD to the alleged conspiracy than he has been able to marshall against the other defendants. Nevertheless, after reviewing this evidence in the light most favorable to the nonmoving party, and with an eye towards the relaxed standard of proof generally employed in conspiracy cases, the court finds that Creek has presented a genuine issue of material fact on the question of OFPD's participation in the alleged conspiracy.

Creek cites the following four letters in support of his claim that OFPD joined a pre-existing illegal conspiracy to block the developments:

* OFPD's October 16, 1980 letter to the Illinois Housing Development Authority expressing its unanimous opposition to the project. As Creek explains, this letter is the centerpiece of its case against OFPD because OFPD had previously approved an earlier version of the project.
* A June 18, 1981 letter from the Westhaven Homeowners Association to Governor Thompson expressing Westhaven residents' opposition to the development. This letter is important because it encloses a copy of the OFPD's October 16, 1980 opposition letter and "copies" OFPD, along with the other non-Westhaven defendants.
* An April 26, 1982 letter from the Westhaven Homeowners Association to the Leadership Council for Open Communities opposing the development and "copying" OFPD along with the other defendants.
* A July 16, 1982 letter from the Westhaven Homeowners Association to Senator Percy opposing the project and "copying" OFPD along with the other defendants.

Like the other non-Westhaven defendants, OFPD strenuously argues that the above letters do not show that it joined any pre-existing illegal conspiracy to block the Pheasant Ridge and Hunter developments. As OFPD explains, its October 1980 opposition letter is limited in content to the potential fire hazard posed by the development, and does not refer to any of the other defendants. Moreover, any reversal in OFPD's position can be easily explained as entirely appropriate in light of what it believed were substantial changes in the layout for the proposed apartment complex. The other letters, OFPD asserts, are simply too remote in time and too tangential in content to fairly link OFPD to any pre-July 1980 conspiracy. Again, these are arguments that are best directed at a jury. As noted above, Creek's burden of proof at this stage is minimal. Although he has not provided the court with overwhelming evidence of OFPD's membership in the conspiracy, a fact-finder could reasonably infer from the evidence he has presented that OFPD, like OSD, participated in the same illegal conspiracy launched by the Westhaven defendants back in January 1979.

II. Proof of Racial Animus

To prevail on his Section 1985 claims, Creek must show that " 'some racial, or perhaps otherwise class-based, invidiously discriminatory animus [lay] behind the conspirators' action.' " *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753, 758 (1993) (quoting *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971)). Each defendant must have acted "at least in part because of, not merely in spite of, its adverse effects upon an identifiable group." *Id.* at 760 (quoting *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979)). As the court found in its April

10, 1992 ruling, a genuine issue of fact clearly exists with regard to the discriminatory animus of Westhaven. (Apr. 10, 1992 Opinion at 19-21). The court finds that summary judgment on the issue of intent is inappropriate with respect to the non-Westhaven defendants as well.

In *Arlington Heights v. Metropolitan Housing Dev. Corp.* 429 U.S. 252, 267-68 (1977), the Supreme Court identified a number of factors that courts must consider in determining whether the requisite discriminatory intent has been shown, including: 1) the historical background of the defendants' actions, 2) the sequence of events leading up to the challenged actions, 3) the existence of any departures from the normal procedural sequence, and 4) the legislative or administrative history of the decision to take action including contemporary statements by members of the decision-making body, minutes of the meetings, and reports. The first two factors, the historical context of the defendants' actions and the sequence of events preceding their commission, are especially probative here.

Prior to January 1979, before any of defendants learned of the Section 8 financing, neither Westhaven nor OSD opposed the development. As Creek notes, things changed once it became clear that many of the units in the proposed development would be occupied by African-Americans.[3] With respect to OSD, Creek offers evidence that in 1975, OSD entered into a contract with Terracom in which it agreed to refrain from taking any

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[3] The alleged conduct of the Westhaven defendants has been well-documented in this court's prior rulings and need not be elaborated on here.

action against the proposed development in exchange for a sum of $44.57 per dwelling unit. The payments were designed to compensate OSD for the impact the increased child population in Westhaven would have on the school. At the time, the plan contemplated the construction of several hundred single-family units. In accordance with the agreement, OSD did not oppose the development—that is, until the fall of 1980.

Creek offers evidence that beginning in October 1980, OSD suddenly joined the other defendants in a heated campaign to stop the development. (*generally* Response at 19-27). In its October 1980 letter to the IHDA, OSD stated that it opposed the project because the increased student population would place an inordinate burden on the school district. (Pl. Ex. 28). As Creek points out, OSD's proffered explanation for its opposition to the development stands in sharp conflict with its earlier position. The project had not grown in size; on the contrary, it appears that the proposed development had been scaled down by almost two-thirds in the several years between OSD's execution of the contract and its October 1980 letter to the IHDA. What had changed, however, was the proposed method of financing. With Section 8 financing, a substantial number of the units in the development would be occupied by African-Americans. Under these circumstances, Creek argues and the court agrees, a fact-finder could reasonably infer that even though OSD's opposition letters cited only its concerns about the increase in the number of students, OSD's sudden opposition to the development was motivated at least in part by racial animus.

Orland Park stands on slightly different ground. Unlike OSD and Westhaven, Orland Park opposed the development before Terracom applied for Section 8 financ-

ing. Nevertheless, as Creek points out, Orland Park did not begin to actively oppose the project until it became clear that a significant number of the units in the development would be occupied by African-Americans. Although there is nothing in the express language of Orland Park's opposition letters suggesting racial animus, the timing of the letters and their similarity in content to letters written by the other alleged conspirators could allow a fact-finder to infer that Orland Park's opposition was also motivated, at least in part, by racial animus.

III. Proximate Cause and Damages

The most troubling aspect of Creek's individual case continues to be the issue of proximate cause and damages. As previously noted, Creek as an individual owned the rights to develop the Pheasant Ridge and Hunter apartments for a short period of time—January 1, 1980 to July 1, 1980. To prevail on his claims for individual damages, he must be able to show that defendants (or at least the Westhaven defendants) acted illegally during this period and that he incurred damages as a proximate result of this action. This court's December 21, 1993 ruling on the *res judicata* effect of the 1979 state court suit filed by Creek's predecessor in interest, Terracom, complicates Creek's task. As the court explained in its December 1993 ruling, under the doctrine of *res judicata*, Creek is barred from recovering damages based on Westhaven conduct occurring prior to August 19, 1979, the date the state court suit was initiated. The doctrine also bars any claims for damages based on conduct that occurred prior to August 1979 and continued through January 1, 1980 to the entry of the state court judgment on April 14, 1980. If either Terracom or Creek wished to re-

cover damages for any injuries resulting from such conduct, they were required to seek redress as part of the then pending suit. They were not entitled to wait to see how things developed, and then file a subsequent suit to recoup their losses. As the court noted in its December 1993 ruling, Creek is nevertheless entitled to recover damages for any claims that accrued after the filing of the state court suit. (Dec. 21, 1993 Memorandum Opinion and Order at 17-22).

At the December 1993 pre-trial hearing, the court specifically directed Creek to set forth his theory on damages, focusing in particular on the crucial period from January 1, 1980 to July 1, 1980. His theory is as follows. On January 1, 1980, when Creek first acquired all of the rights to the development, he was capable of completing the syndication and IHDA financing of the development by 1981 with the support of only a ten percent co-general partner. The co-general partner was required merely to help Creek meet the IHDA's financial net worth requirements. (Sept. 29, 1993 Creek Dep. at 195). However, because of Creek's limited financial resources and the heavy carrying costs associated with the development, time was of the essence. He needed the IHDA funding and the infusion of cash from the planned syndication of the development soon if he was to continue to develop the project as an individual.

Unfortunately for Creek, the Westhaven defendants continued to refuse to approve the plan and issue the necessary building permits. This misconduct was the subject of the ongoing state court lawsuit. Until the matter was resolved, Creek's ability to move forward on the project was limited. As Creek explains, an IHDA official had allegedly informed his predecessor Terracom that no action would be taken on any application for IHDA loans

for the Pheasant Ridge/Hunter project until the litigation was resolved. Thus, Creek could not even apply for an IHDA loan until April 1980 when the state court judgment in his favor was entered. (Feb. 24, 1994 Creek Aff. ¶ 11). The uncertainty created by Westhaven's misconduct and the related litigation similarly affected his syndication efforts. In his July 1993 deposition, Creek testified that potential syndicators contacted by Creek when he was with Terracom in 1979 indicated that they were not interested in investing while the litigation with Westhaven was pending. (July 30, 1993 Creek Dep. at 130).

The delay allegedly injured Creek in other ways as well. According to Creek, IHDA internal regulations changed during the critical period in early 1980 while the suit with Westhaven was pending. To comply with the new policy, Creek was required to reduce the overall number of units in the development from 216 to 176. (Sept. 29, 1993 Creek Dep. at 263-64). Creek claims that if he had been able to apply for the IHDA loan back in January 1980 when he first obtained his 100 percent individual interest in the development, he could have been approved for the entire 216 units. A critical reduction in the federal income tax rates also contributed to Creek's damages. As Creek's damages expert, James A. Haran explained in his deposition, in early 1980, when the maximum tax rate was as high as seventy percent, investment opportunities similar to the one offered by Creek were very attractive to tax conscious investors. However, because of the delay created by Westhaven's continuing refusal to issue the permits and approve the plan, Creek was unable to take advantage of the high tax rate in marketing his development. By the time he was able to syndicate the development, tax rates had been

lowered, and the attractiveness of the project to outside investors was significantly diminished.

On April 14, 1980, judgment was entered against Westhaven. The logjam had broken, and Creek was finally able to apply for IHDA funding. He filed his application roughly one month later, on May 16, 1980. Unfortunately for Creek, the IHDA approval process required more time than he could afford, and on July 1, 1980, he was forced to transfer his entire individual interest in the development to the Pheasant Ridge Venture ("PRV"), in which he retained a 90 percent share as a general partner. As Creek explains, the extension costs he incurred from January 1, 1980 onward while Westhaven delayed the project through its continuing refusal to issue the necessary permits forced him to divest himself of his individual interest in the development:

> The illegal conspiracy prevented Mr. Creek from developing the property as planned, forcing him to decide between abandoning the development, in which case he would have been forced to sue for his entire loss as of that date, or attempting to mitigate his damages by disposing of only that portion of his interest necessary to raise the needed funds for additional costs.

(Creek Response at 34).

Thus, it is now clear that Creek's entire case for individual damages turns on the very same misconduct that was at issue in the 1979 state court suit—Westhaven's continuing refusal to issue the required building permits and approve the plan. Yet, as this court held in its December 1993 ruling, the doctrine of *res judicata* bars recovery of damages in this suit for misconduct which could have been redressed based on the claims presented in the 1979 state court suit. It is beyond dispute that

Creek and his predecessor-in-interest could have sought and obtained compensation in state court for the increased carrying costs and other harm caused by Westhaven's pre-April 14, 1980 refusal to issue the required permits. Indeed, had he done so, Creek may have been able to develop the project himself as he consistently has maintained was his goal. Instead, Creek chose to forge ahead, allowing the damage flowing from the pre-April 14, 1980 delay to multiply. Under the doctrine of *res judicata*, he cannot now recover for damages flowing from the very misconduct that was the subject of the prior state court suit. Because all of plaintiff's claims are predicated on this same misconduct, the court must reluctantly grant defendants' motion for summary judgment on all of his claims.

In so holding, the court has anticipated and rejected several arguments that plaintiff might have made in support of his case. First, the court notes that plaintiff is not barred under the doctrine of *res judicata* from recovering individual damages flowing from misconduct that occurred after the entry of the April 1980 state court judgment and Creek's July 1, 1980 divestment of his individual interest in the development. This would include Westhaven's post-April 14, 1980 refusal to issue the necessary permits. Nevertheless, as the court understands plaintiff's theory of the case, the critical period of delay ran from January 1, 1980 to April 14, 1980. Once the state court had entered judgment against Westhaven, Creek was free to apply for IHDA funding and pursue his development as planned. In other words, the damage had already been done, and Westhaven's continued refusal to issue the permits from April 14, 1980 through July 1, 1980 does not appear to have caused him any additional individual damages.

Second, as the court has previously held, plaintiff can recover for any damages caused by separate illegal acts that occurred after the state court suit was filed but prior to July 1, 1980. However, the evidence presented in response to defendants' motion for summary judgment indicates that all of Creek's damages flow from Westhaven's refusal to issue the necessary building permits—conduct that first occurred prior to the filing of the state court suit and simply continued through April 1980. This type of continuing conduct does not give rise to new independent causes of action. *See Supporters to Oppose Pollution v. Heritage Group*, 973 F.2d 1320, 1326 (7th Cir. 1992) (*on-going* releases of hazardous materials into landfills that were known at time of initial suit did not constitute a "new wrong" permitting additional litigation). *Cf. Green v. Illinois Dept of Trans.*, 609 F. Supp. 1021, 1026-27 (N.D. Ill. 1985) (distinguishing between continuing violations of federal law and discrete acts which create new claims).

Third, Creek might have argued that his conspiracy claim did not accrue until after the state court suit was filed, and therefore cannot be barred by the prior action. Indeed, in a prior pleading, Creek asserted that only after April 14, 1980 did it become clear that Westhaven's seemingly isolated actions were in fact part of a concerted effort to block the project. However, as the court noted in its December 1993 ruling, civil conspiracy claims are generally held to accrue when the plaintiff knows or should know that he is suffering from a wrong for which damages may be recovered in a civil action. (Dec. 1993 Opinion and Order at 19 n. 11) (citing *Wilson v. Giesen*, 956 F.2d 738, 740 (7th Cir. 1992)). As has now become clear, the alleged conspiracy here involved joint action by the Village of Westhaven, its Mayor, its trustees, the vil-

lage zoning and planning board, and the village engineer. There can be no doubt that Creek and his predecessor-in-interest, Terracom, were well aware of this conspiracy at the time the state court suit was filed. The court rejects any argument based on the notion that plaintiffs conspiracy claim did not accrue until after the state court suit was filed.

Fourth, the court is aware that Creek incurred most of his damages after the state court judgment was entered. Nevertheless, the critical issue here is not when the bulk of the damages were incurred, but rather when the cause of action allowing recovery of these damages first accrued. In extraordinary circumstances, the difficulty of measuring future injury may prevent a plaintiff from asserting a present claim for all of his damages. So Charles A. Wright, Arthur R. Miller, Edward H. Cooper, Federal Practice and Procedure: Jurisdiction § 4409. For example, in *Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506, 516-22 (5th Cir. 1984), the court held that a plaintiff who had been exposed to asbestos but had not contracted cancer could not bring suit to recover damages based on the mere possibility that he would contract cancer in the future. Reasoning that plaintiff's claim for these future damages had not matured, the court concluded that the doctrine of *res judicata* would not bar a subsequent suit for such damages if he were to contract asbestos-related cancer in the future.

Here, however, the potential for future damages based on Westhaven's misconduct was not so speculative as to prevent Creek or his predecessor-in-interest from seeking such damages as part of the state court suit. Indeed, according to Creek, most of the injuries for which he now seeks redress were suffered as early as July 1, 1980, just two and one-half months after the entry of judgment in

the state court suit, when he was forced to abandon his plan to individually develop the Pheasant Ridge and Hunter apartments. Under Creek's own theory of the case, he could have avoided these future damages by recovering his then present damages (the costs of the pre-April 14, 1980 delay) in the state court suit.

Finally, the court notes that although the state court suit was originally brought by Terracom, the doctrine of *res judicata* applies with equal force to Creek, Terracom's successor in interest. Under Illinois law, "[a] privy to a judgment or decree is one whose succession to the rights of property thereby affected occurred after the institution of the particular suit, and from a party thereto." *Schafer v. Robillard*. 17 N.E.2d 963, 967 (Ill. 1938); *see also Smith v. Bishop*, 187 N.E.2d 217, 219 (Ill. 1962) (same); *Local 1006 v. Wurf*, 558 F. Supp. 230, 235-36 (N.D. Ill. 1982) ("privity exists among plaintiffs for purposes *res judicata* . . . when assets and property rights are transferred") (citing *American Equipment Corp. v. Wikomi Mfg, Co.*, 630 F.2d 544 (7th Cir. 1980).

Conclusion

For the foregoing reasons, the court grants defendants' motion for summary judgment. All pending motions are stricken as moot. This case is dismissed.

E N T E R:

Ann Claire Williams, Judge
United States District Court

Dated: Jan. 24, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

J. FRED CREEK, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 83 C 1851
	)	
	)	
VILLAGE OF WESTHAVEN, et al.,	)	Honorable
	)	Paul E. Plunkett
Defendants.	)	

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that pursuant to the court's memorandum opinion and order entered January 24, 1995, summary judgment is entered in favor of the "Westhaven defendants", defendants, Orland Park, the Orland Fire Protection District, and the Orland School District No. 135 against plaintiff.

January 24, 1995
Date

_____
Clerk

_____
(By) Deputy Clerk